APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission.

(April 17, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Sun Oil Company, herein called Sun, made a contract bearing date August 26, 1947, with Southern Natural Gas Company, herein referred to as Southern, for the sale to the latter of natural gas to be produced by Sun from the Gwinville Field in Mississippi. The contract provided that it should be in effect for ten years commencing on the date of the first delivery of gas by Sun to Southern. This date was September 3, 1947. The contract provisions as to price were in these terms:

"Subject to the provisions of Article VI hereof, providing for a possible adjustment in price, Buyer agrees to pay Seller for all gas purchased hereunder a price

(1) of seven and one-half cents (7½¢) for each one thousand (1,000) cubic feet of gas during the first five (5) years of the term hereof;

(2) of eight cents (8¢) for each one thousand (1,000) cubic feet of gas during the second five (5) years of said term."

Immediately following the foregoing was this proviso:

"In this connection, it is understood that by this agreement Seller is not dedicating to Buyer, or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *."

Subsequent to the *Phillips Petroleum* case,[1] decided on June 7, 1954, the Federal Power Commission supplemented the provisions of the Natural Gas Act, 15 U. S. C. A. § 717 *et seq.*, by issuing its so-called No. 174 series of orders[2] which required independent producers of natural gas to file rate schedules and apply for certificates of public convenience and necessity. Sun applied for and procured a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. It filed the contract as a rate schedule under Section 4 of the Natural Gas Act.[3]

Prior to the termination of their agreement Sun and Southern made a new agreement in 1957 which was to become effective upon the expiration of the 1947 agreement. This provided for continued deliveries of gas in the same field and with the same facilities. The contract was, for the most part, substantially the same as that which it succeeded. The primary difference was an increase from

---

[1] *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, 3 P U R 3d 129.

[2] 18 C F R §§ 154.91-154.102, §§ 157.23-157.31.

[3] 15 U. S. C. A. § 717 c.

8¢ per Mcf to 20¢ per Mcf of gas. Sun then applied, under the new contract, for a new certificate of public convenience and necessity and filed the new contract as as initial rate schedule. The Commission rejected the application and filing on the ground that, the same service being involved, any new certificate would merely duplicate the earlier certificate which was still effective and outstanding and the proposed rate filings were of rate changes rather than initial rate filings. Protesting the Commission's order and reserving its right to contest it, Sun resubmitted the 1957 contract as a rate change. The Commission then, as is authorized by Section 4 of the Act, suspended the effectiveness of the rate change for the statutory period of five months. At the expiration of the five-month period, the 20¢ rate was placed in effect and Sun undertook to make such refunds as might be required. Sun has petitioned this Court to review the order of the Commission rejecting the application for a certificate and an initial rate filing, and the order suspending the rate change. Although a number of specifications of error are made, most of them are hinged upon the proposition that the rate set forth in the new contract was an initial rate filing, and the collateral doctrine that the certificate of public convenience and necessity which was originally issued had expired and become *functus officio* upon the date fixed for the expiration of the first contract by its terms.

It is "rates and charges" that are subject to regulation.[4] The method of filing and regulating rates has thus been succinctly stated.

> "The act requires natural gas companies to file all rates and contracts with the Commission (§ 4(c)) and authorizes the Commission to modify any rate or contract which it determines to be 'unjust, unreasonable, unduly discriminatory or preferential' (§ 5(a)). Changes to previously filed rates or contracts must

[4] Natural Gas Act § 4(a), 15 U. S. C. A. § 717c (a).

be filed with the Commission at least 30 days before they are to go into effect (§ 4(d)), and, except in the case of industrial rates, the Commission may suspend the operation of a new rate pending a determination of its reasonableness. (§ 4(e)). If a decision has not been reached before the period of suspension expires, a maximum of five months, the filed rate must be allowed to go into effect, but the Commission's order may be made retroactive to that date." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, 12 P U R 3d 112.

In the *Mobile* case United was obligated by contract to furnish gas to Mobile at a fixed rate during the contract period of ten years. There was no provision for any different rate nor was there any provision made for changing the rate during the contract term. United undertook to effect a rate increase by filing a new rate schedule with the Commission. It was held that the Natural Gas Act gave no power to put unilateral rate increases into effect, and that United could procure a rate increase, if at all, only by an order of the Commission entered in a proceeding under Section 5 of the Act.

It is urged that the decision in Mobile recognizes a freedom of contract in rate making applicable alike to new contracts and to renewal contracts. The "philosophy of Mobile", as it is referred to, is such as to require, it is contended, a holding that when a contract has, by the law of contracts, terminated, the parties are permitted to fix rates for the continued service, free from Section 4 regulation, in the same manner that might have been done before the passage of the Act. We do not think the doctrine of Mobile applies in a situation, such as is before us here. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103, 79 S. Ct. ....., 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, ... S. Ct. ....., 3 L. Ed. 2d 350, it was held that Section 4 procedures were available where rate increases were proposed pursuant

to a "going rate" provision in the contract. The purpose of Congress was carried out in framing its regulatory scheme "not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, * * * (subject of course to any overriding authority of the Commission), but also by providing in Section 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate review." 358 U. S. 114.

The same doctrine has been applied where the contract contained a "favored nation" clause and it has been held that rate increases under such a clause are subject to Section 4 of the Act. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5th Cir. 1947, 162 F. 2d 388, 71 P U R N S 182, cert. den. 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355. So too it has been held that rate increases pursuant to the escalator clause of a contract which predated the *Phillips* decision of June 7, 1954, were rate changes subject to Section 4 of the Act and not initial rates subject to Commission review only under Section 5 of the Act. *Bel Oil Corporation* v. *Federal Power Commission*, 5th Cir. 1958, 255 F. 2d 548, 24 P U R 3d 512, cert. den. 358 U. S. 804, ____ S. Ct. ____, 3 L. Ed. 2d 76. It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5.

The foregoing disposes of the principal question presented. Other questions remain. The Petitioner contends that since its certificate originally issued authorized

the sale by it of natural gas "as more fully described in the application and exhibits", and since the certificate was issued under an order providing that the certificate "shall be effective only so long as the Applicant continues the acts or operations hereby authorized," it must follow that the certificate expired with the contract and the rejection by the Commission of the application for a new certificate was invalid. This contention is based upon a misconception of the purpose and effect of the certificate. The authorization of the certificate is not only for the sale of gas pursuant to the contract but pursuant to and subject to the provisions of the Act and regulation pursuant thereto by the Commission. The Commission has the power under Sections 7(c) and 7(e) of the Act, 15 U. S. C. A. § 717f(c), (e), to issue certificate of public convenience and necessity of limited duration. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794, 18 P U R 3d 320. Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate. The matters to which the Petitioner points do not permit of the inference which it would have us draw.

The Petitioner asserts that because of the rejection of the application for a second certificate without a hearing after notice there was a violation of the administrative requirement of Section 7(c) of the Act, 15 U. S. C. A. § 717f(e). The Petitioner makes a like contention with respect to the rejection of its second contract as an initial rate filing. Where, as in this case, there could be no right to have a certificate of public convenience and necessity issued which duplicated a certificate outstanding and operative; and where, as here, the second contract was a nullity as an initial rate filing, it was proper to reject them

without notice and without a hearing. *Cf. United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, supra.*

The Commission suggests that the orders which Sun brings before us for review are interlocutory and that administrative remedies have not been exhausted. To support this view reliance is placed upon *Shank, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 830, 15 P U R 3d 408, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 324, and *Lee, Trustee,* v. *Federal Power Commission,* 5th Cir. 1956, 236 F 2d 835, cert. den. 352 U. S. 970, 77 S. Ct. 361, 1 L. Ed. 2d 323. In the cited cases the orders were mere procedural steps in the administrative process. The orders which we here review are "of a definitive character dealing with the merits of a proceeding before the Commission and, as such, are reviewable under Section 19(b) of the Act, 15 U. S. C. A. § 717r(b). *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408, 24 P U R N S 394; *Magnolia Petroleum Co.* v. *Federal Power Commission,* 5th Cir. 1956, 236 F. 2d 785, 15 P U R 3d 364, cert. den. 352 U. S. 968, 77 S. Ct. 356, 1 L. Ed. 2d 322. We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. The orders were formal determinations of rights of the petitioners and the effect of the orders was not contingent upon future administrative action. We have no doubt that these orders should be passed upon by this Court.

Sun urges that its contractual relationship with Southern is only for the sale of natural gas, that it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act, 15 U. S. C. A. § 717f(b). Our decision in *Continental Oil Company* v.

Federal Power Commission, ____ F. 2d ____, decided this day, is controlling on this issue. A like contention was made before the Court of Appeals for the Third Circuit and its well reasoned conclusions are contrary to the position urged by Sun. *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir. 1956, 236 F. 2d 550, 15 P U R 3d 434, cert. den. 352 U. S. 971, 77 S. Ct. 363, 1 L. Ed. 2d 324. The principles there announced are sound and are applicable here. The decision of this Court in *Deep South Oil Company of Texas* v. *Federal Power Commission*, 5th Cir. 1957, 247 F. 2d 882, 20 P U R 3d 469, is not in conflict.

It follows that the Commission's orders should be and hereby are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17040

SUN OIL COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17049

S. W. RICHARDSON, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17128

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17136

MAGNOLIA PETROLEUM COMPANY, *Petitioner*,

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

No. 17256

HUNT OIL COMPANY, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION.

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

I am in full agreement with the Court that the orders are reviewable. I also accept, as binding on me, our prior decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255

F. 2d 548, cert. denied 358 U. S. 804, S. Ct. , 3 L. Ed. 2d 76, holding that an automatic stepped-up escalator increase is a change of rate. I do that even though that decision was based primarily on our earlier one of *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 5 Cir., 1947, 162 F. 2d 388, cert. denied 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355, which in turn was pronounced in the pre-*Mobile* era when all thought that contracts of a natural gas company, as in the case of any other public utility, were subject to an overriding public regulation. *Mobile* accorded almost absolute sanctity to the private contract and rejected, without so much as a deferential footnote citation, the traditional and contrary concept of which *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 1919, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, was the symbol as well as the *cause celebre* around which the controversy raged before the Commission and the Third Circuit. 215 F. 2d 883, 886.

But in the face of *Mobile* and what it teaches, I think the Court's substantive action affirming the Commission disregards the limited nature of the jurisdiction of the Federal Power Commission, ignores the special and decisive relevance of contract terms, and does all of this without a hearing. I cannot acquiesce in this and must therefore, with deference, dissent.

I.

At the outset I think it well to point out that in reality there is but one basic question. To split it up into apparently separate issues concerning the scope of the Certificate, the change of rate in the contract, or potential abandonment of service "facilities" really only confuses. That is so because these essentially beg the question. For example, if the new contract and its new price is a change of rate, then obviously, it is not an initial rate and it must be filed under Section 4(d) subject to supervision and rebate. If the "sale" is something apart from the

contract which alone brought it about, so that it must continue after the contract has completely expired by its own terms, then no new Certificate is required, the original one is sufficient, and the new application should be denied. On the other hand, if the power of the Commission over the producer is limited to the "sale" reflected by the contract, then the grant of authority expired with the sales contract, so that a new Certificate would be required since all agree it is illegal to sell or transport or render service without a Certificate. Likewise, on that assumption, the old having expired, all there is is now new, and the new contract would be an initial rate subject only to § 5 review and not to § 4 interim suspension and rebate.

Each of these things results depending on the basic decision. But none is really a reason *why*.

I submit that a careful reading of the Court's opinion reflects that it finds no real reasons, and in the final analysis what it does, as it has done in *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, F. 2d [No. 17016], this day decided, is to arrive at its decision out of the conscientious belief that regulation is otherwise ineffectual. I would be the first to think that we could legislate interstitially, but that hardly includes engraftment or transplanting of a congenitally missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon.

II.

The Court, after pointing out that we have held that during the life of an *existing contract*, an increase in price from the operation of a most-favored-nation's clause and from an automatic stepped-up escalation clause are rate changes subject to § 4 review, then sets forth as its sole reason which "disposes of the principal question presented" this language:

> "It necessarily follows that where, upon the *termination* of a *contract* fixing a rate which was the sub-

ject of an initial rate filing with the Commission, a *new contract* between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate. The rate fixed by the *new contract* is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5." (emphasis supplied)

Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that "upon the *termination* of a contract" a "*new* contract between the same parties" is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*.

The jurisdiction of the Commission is limited. The act at one end excludes all that is encompassed within production and gathering and, at the other end, the distribution and sale of it to the local consumer. § 1(b). It does not undertake to regulate the "business" of natural gas. "Three things and three things only Congress drew within its own regulatory power delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 503, 69 S. Ct. 1251, 93 L. Ed. 1499.

As these producers are not engaged in transportation, the sole basis for jurisdiction is the *sale* for resale. For "until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such sale the jurisdiction of the Commission applies but only because

of the sale and only to the extent that the Natural Gas Act confers jurisdiction." *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 1957, 250 F. 2d 61, cert. denied 355 U. S. 956, 78 S. Ct. 542, 2 L. Ed. 2d 532.

The *sale* is therefore vital. It is the alpha. Can this Court be right by holding that there is no omega?

This is important especially in view of the cyclonic case by case development under the Act subjecting the owner of a gas well to the awesome obligations of an orthodox utility despite the obvious "* * * fact that procedures are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 556.

Local distributors cannot get natural gas without transmission lines. Transmission companies cannot obtain the needed astronomical financing unless the entrepreneurs have long-term commitments by distributors to take, and by producers to supply, the gas. Despite the fact that the long-term supply contract must deal with unknown economic factors of a kind which would ordinarily permit a commodity owner to provide an ascertainable but adjustable formula to determine price, we have held that such agreed adjustments are rate changes. *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 548. When such increase or "rate changes" are sought, the producer must satisfy the standards prescribed by the Commission to determine whether the rate will be "just and reasonable." § 4(a). *Forest Oil Co.* v. *FPC*, 5 Cir., 1959, ____ F. 2d ____ [No. 16844]. To whatever extent any part of the producer's physical equipment serves to effectuate the sale or contain the gas at the point of sale delivery, it becomes a "facility" prohibiting abandonment of any "service" performed thereby. *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, ____ F. 2d ____ [No. 17016].

I do not believe that Congress ever intended that the moment the first cubic centimeter of gas started its irrepressible journey from the bowels of the earth to a Brooklyn burner tip, the gas well owner had committed himself and his commodity irrevocably either to the purchaser or to the life and death regulatory power of a remote agency.

III.

How was this likelihood to be avoided? Herein lies the explanation for stating the *grant* of power, and hence its *limitation*, in terms of *sale*. Power was not prescribed, as it might have been, in terms of "service," or the "furnishing," or the "supplying" of gas. What was required was a *sale*. This was a term having both an industry-gas-business relevance and a meaning readily understood by Congress. Despite the awkwardness which arises from the *Phillips* retrospective infusion of a general Congressional purpose to regulate sale by producers which the Commission and others for sixteen years thought to be nonexistent, this was as though Congress spelled out this policy: a producer need not sell for resale in interstate commerce; if he makes a sale, he will, for the duration of that sale, be subject to public utility regulation; when that sale is completed, he will then have the opportunity to reassess his position and determine whether he will cease production, sell in intrastate commerce, or make a new sale for resale in interstate commerce. In this way there was some practical adjustment of the conceptual difficulties involved in subjecting, for the first time in the nation's history, the owner of an exhaustible natural resource to a limited regulation.

IV.

I would quickly emphasize that I do not think that stating Commission jurisdiction in terms of *sale* inevitably ties jurisdiction to all of the refinements of the law of sales. But if, as this Court concludes—erroneously I think

—that Congress used "production" in its everyday sense, *Continental Oil Corp.* v. *FPC*, 5 Cir., 1959, F. 2d , [No. 17016], then it is an understatement to say that it certainly must have had in mind the usual connotations of a word and term so well understood and so much used as "sale." In this light, it meant at least a relationship growing out of a contract. "'[S]ale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson* v. *Berry*, 1850, 49 U. S. (8 How.) 495, 544, 12 L. Ed. 1170. *Curtis* v. *O'Leary*, 8 Cir., 1942, 131 F. 2d 240; 77 CJS, Sales, § 1, at 575 (1952).

There are four main elements to a sale, which is to say a contract, express or implied, of sale: (1) a seller and a buyer; (2) a commodity or service; (3) a price or consideration; and (4) a quantity or time. We know for certain that the Commission cannot order an involuntary sale by a producer to a pipe line, so element (1) is fixed by the parties. The gas producer is unlike the traditional public utility whose holding out binds him to serve all on common terms. Element (2) is confined to gas with the possible expansion into the area of a service facility. We likewise know for an absolute certainty from *Mobile*, that the Commission cannot prescribe the price. This, too, is left to the parties subject only to a right to review by a hearing and on evidence under § 5. That takes care of element (3). On what basis, other than the insupportable one of judicial-administrative necessity can the Commission prescribe element (4)—that is, the *amount* of the commodity to be sold, whether expressed in terms of total quantity, or quantities for a stated term?

If the *amount* of the commodity, element (4), is thought of in terms of the *quantity* to be delivered, we know for a certainty that the Commission could not order a producer to deliver *more gas* than contracted for. This is

so because, whatever else may be the vagaries of the § 1(b) production and gathering exclusion, the Commission lacks power to order more production. It could not, for example, compel a producer to rework a sickly well, explore a new horizon, attempt to exploit and tap a new reservoir, much less drill an additional well in order to permit, under state conservation laws, an increase in allowable production and hence deliveries to the pipe line purchaser. This prohibition is so far-reaching that the Commission even lacks the power to order an increase in *transportation* facilities because this would indirectly compel an increase in production. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1953, 204 F. 2d 675. See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 1949, 337 U. S. 498, 504-505, 69 S. Ct. 1257, 93 L. Ed. 1499; *Colorado Interstate Gas Co.* v. *FPC*, 1945, 324 U. S. 581, 598, 65 S. Ct. 829, 89 L. Ed. 1206; *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U. S. 591, 612-615, 64 S. Ct. 281, 88 L. Ed. 333; *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U. S. 672, 678, 74 S. Ct. 794; 98 L. Ed. 1035; *Interstate Natural Gas Co.* v. *FPC*, 1947, 331 U. S. 682, 690, 67 S. Ct. 1482, 91 L. Ed. 1742.

Of course if the Commission cannot compel an increase in quantity deliverable under a contract, it may not do so by enlarging the period of *time* during which such deliveries are to be made. The result is the same. The impact is the same. In each case the Commission's order would be ineffectual unless *more* gas were produced, and this is forbidden territory to the Commission.

V.

The Supreme Court makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and order. This basic approach pervades all said and done in *Mobile*.

"The Natural Gas Act * * * recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules. * * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * * [T]he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. * * * Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act, is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the act." 350 U. S. at 339, 343, 344, 345. See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 1958, ... U. S. ....., ... S. Ct. ..... 3 L. Ed. 2d 153.

VI.

Both expressed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e., quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the "new" contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the

sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificially short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction.

On the latter the Commission may grant a certificate of limited duration. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 1956, 239 F. 2d 97, reversed per curiam 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794. Conversely, it may grant them without limitation. As a condition to granting the initial Certificate, the Commission can determine whether the proffered contract is genuine and binding for a substantial period of time. If it thinks it not, it may decline the issuance of the Certificate. If, as these cases present, a "new" Certificate is requested for the "new" contract, the Commission can again look at it. Unless the proposed contract subjects the producer to substantial obligations permitting effective regulation for the future, the Commission may decline the Certificate.

All it may not do is force a producer either to produce *more* gas, or sell *more* gas, or sell *more* gas for a longer time. If that is to occur after the expiration of the initial contract, it may be done only upon application of the parties pursuant to a new agreement. The Commission still has the last check since the condition for the grant of the new Certificate may be alteration in the terms of the agreement.

VII.

Finally, all of this has come about with no hearing, with no opportunity for hearing, and with an absolute refusal of the Commission even to receive the various applications for the purpose of a hearing. Section 7(e)

prescribes a hearing to determine whether a Certificate should be issued and whether, and to what extent, special conditions ought to be imposed on the grant. Section 7(e) requires that a hearing be held. Whether, and to what extent, the initial contracts were genuine, and whether, and to what extent, the "new" contracts were merely a continuation or something substantially different, involved at least questions of judgment which could not be foreclosed peremptorily by slamming the door shut before it was scarcely opened. *Northeastern Gas Transmission Co.* v. *FPC*, 3 Cir., 1952, 195 F. 2d 872, cert. denied 344 U. S. 818, ... S. Ct. ....., 97 L. Ed. 637; *Mississippi River Fuel Corp.* v. *FPC*, 3 Cir., 1953, 202 F. 2d 899; *Cities Service Gas Co.* v. *FPC*, 10 Cir., 1958, 255 F. 2d 860. The Administrative Procedure Act, 5 USCA §§ 1001-1011, applicable to the Federal Power Commission, *State Corporation Commission of Kansas* v. *FPC*, 8 Cir., 1953, 206 F. 2d 690, likewise assures a hearing. *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, ... S. Ct. ....., 94 L. Ed. 616; *Riss & Co.* v. *United States*, W. D. Mo., 1950, 96 F. Supp. 452, rev'd, 1951, 341 U. S. 907, ... S. Ct. ....., 95 L. Ed. 1345.

The peremptory nature of the Commission proceedings which we approve is dramatically demonstrated by the Court's reference to the producer's contentions under § 7(b). To the argument of the producer that "it engages in no service and renders no service, that it does not propose to abandon any facilities, that it has no facilities subject to the Commission's jurisdiction and hence it is not subject to Section 7(b) of the Act * * *," the Court holds "our decision in *Continental Oil Company* v. *Federal Power Commission*, ... F. 2d ....., decided this day, is controlling on this issue." Accepting, for the moment, the correctness of our decision in *Continental Oil Company*, that decision deals at length with minute facts concerning a specific well which was the subject of an extensive hearing. In this proceeding, without hearing, without evidence, without knowing whether, in the sense of *Con-*

tinental Oil Company, there is any "facility" by which the service is performed, this Court proceeds to declare that the Commission could take similar action.

The joint effect of these opinions today announced is to destroy the last remnant of the § 1(b) production and gathering exclusion. By forcing the owner of a natural resource to continue deliveries until the reservoir is exhausted, and to continue the delivery of gas if some piece of equipment effectuates the sale or its containment at the point of delivery, inevitably means that production is in the hands of the Commission. Congress has posted this as off limits to the Commission. Only Congress may make the change.

I therefore respectfully dissent.

A true copy
Test: [s] Eward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
Aug 3, 1959

Judgment

Extract from the Minutes of April 17, 1959.

No. 17040.

SUN OIL COMPANY,

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for review of orders of the Federal Power Commission issued on September 12, 1957 and November 8, 1957 in Docket Nos. G-13059 and G-13664, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

"BROWN, Circuit Judge, dissenting."

APPENDIX B

Excerpts from the Constitution of the United States Amendment V—Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4.

* * * * * * * * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty

days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification,

or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c.]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-

gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7.

* * * * * * * * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale

[1] Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)] [2]

* * * * * * * * * *

---

[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

---

any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] Subsection 7(e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

* * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19.

* * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States [8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * * * * * * *

[redacted]

BRIEF FOR THE FEDERAL

PUBLIC DEFENDER IN

[illegible]SITION

In the Supreme Court of the United States

October Term, 1959

No. 321

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter order of the Federal Power Commission, dated September 12, 1957 (R. 174-176), is not reported. The Commission's orders, issued November 8, 1957 (R. 188-191, 192-195), are reported at 18 F.P.C. 609 and 611. The opinions of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-20a) are reported at 266 F.2d 222.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. App. 21a). A petition for rehearing, timely filed, was denied on June 3, 1959. The petition for a writ of certiorari was filed on August 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

A producer of natural gas was granted by the Federal Power Commission a certificate of public convenience and necessity to supply gas to an interstate pipeline, and to operate facilities for that sale, without any condition limiting the certificate to the term of his contract with the pipeline (10 years). The producer also filed the contract as its rate schedule pursuant to the Commission's rules. The questions presented are:

1. Does the expiration of the contract terminate the producer's certificate and obligation to supply gas to the pipeline?

2. Does the producer's subsequent execution of a new contract with the same pipeline for the same gas supply for a further period of years, but at a higher price, constitute a different "operation, sale, [or] service" for which a new certificate should be issued and an initial rate-filing made; or is the new higher rate a "change" in rate which is subject to a hearing under, and the procedures of, Section 4 of the Natural Gas Act?

3. In these circumstances, may the Commission without hearing reject the producer's application for a new certificate where it permits the producer to file its new contract as a "change" in rate for the sale covered by the previously issued certificate? [1]

STATUTES INVOLVED

The applicable provisions of the Natural Gas Act are set forth in petitioner's appendix at pp. 22a-29a.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas from certain unitized leases in the Gwinville Gas Field in Mississippi to Southern Natural Gas Company. The sale was commenced under a contract entered into in August 1947 for a term of ten years from the date of first delivery (Pet. App. 1a). The contract price was 7½¢ per Mcf for the first 5 years, and 8¢ for the next five (Pet. App. 1a-2a).

In November 1954, petitioner filed the contract with the Federal Power Commission as its FPC Gas Rate Schedule No. 55 (R. 35, 43), pursuant to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the Commission's No. 174 series of orders (18 C.F.R. (1958 Cum. Supp.) 154.91, *et seq.*) implementing that decision. On May 28, 1956, the

[1] If certiorari should be granted, we reserve the right also to argue, as we did in the court below, that petitioner was not entitled to immediate review of the order of the Commission setting for hearing and suspending the rate schedules which had been filed as rate changes because that order was procedural and interlocutory.

Commission issued a certificate of public convenience and necessity authorizing the sale of natural gas to Southern (R. 145, Pet. App. 2a).

On August 13, 1957, petitioner filed a certificate application seeking authorization for service to Southern based on a new contract, dated August 1, 1957, which was to be effective on the expiration date of its existing agreement (R. 165, Pet. App. 2a) and at the same time tendered the new contract for filing as an "initial" rate schedule (R. 163). This new contract merely continued the service already supplied to Southern from the same field and reservoirs, but at the rate of 20¢ per Mcf (Pet. App. 2a-3a). Petitioner did not apply for approval of abandonment of the sale under Section 7(b) of the Natural Gas Act at any time.

The Commission rejected the application and the proffered filing on September 12, 1957, because, as its letter to petitioner explained, the certificate would have duplicated the previously issued and still effective certificate and the rate schedule would have increased petitioner's existing rate and should have been filed as a rate change under Section 4(d) of the Act (Pet. App. 3a, R. 174).

Thereafter, petitioner applied for rehearing and at the same time filed its new contract under protest as a rate change (R. 133-134). On November 8, 1957, the Commission denied reconsideration, reiterating its previous explanation (R. 188). The proposed rate change was suspended and set for hearing the same day (R. 192). Petitioner's timely application for a rehearing with respect to the hearing and suspension

order was also rejected by the Commission (R. 198, 204).

The court below, with Judge Brown dissenting, affirmed the Commission's orders in all respects. It held that, where a new contract is made between the same parties for the same service as provided by a terminated contract but at a higher rate, the new rate is a rate change, not an initial rate, and accordingly the rate provided for by the new contract is subject to the suspension provisions of Section 4 of the Act (Pet. App. 5a).

ARGUMENT

This petitioner advances essentially the same arguments made by the petitioner in *S.W. Richardson* v. *Federal Power Commission*, No. 208, this Term, seeking review of a companion decision of the court below on a record parallel to the present one. The Fifth Circuit based its decision in *Richardson* (266 F.2d 233), decided the same day, on its opinion in this case. For the reasons stated at pp. 5-10 of our brief in opposition in *Richardson*, to which we respectfully

refer the Court, we submit that this petition should likewise be denied.[2]

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
Attorney.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

PETER H. SCHIFF,
Attorney,
Federal Power Commission.

SEPTEMBER 1959.

---

[2] Richardson's contention that the Section 7(b) prohibition of abandonment without Commission approval does not apply to him because his sale is not made by means of facilities subject to Commission jurisdiction, which is discussed at pp. 10-12 of our brief in opposition in *Richardson*, is not involved in the present case.

U. S. GOVERNMENT PRINTING OFFICE, 1959 823883 352

FILE COPY

REPLY BRIEF OF
PETITIONER SUN OIL
COMPANY

FILE COPY

Supreme Court, U.S.
FILED
OCT 5 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

MARTIN A. ROW
EDWIN M. CAGE
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
MAY, SHANNON AND MORLEY
1700 K Street, N.W.
Washington 6, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its Reply Brief to the Brief for the Federal Power Commission (Respondent) in Opposition.

PRELIMINARY STATEMENT

In its Brief in Opposition Respondent asks this Honorable Court to deny the Petition for a Writ of Certiorari for the reasons set forth in the Brief in Opposition in Cause No. 208, October Term, 1959, *S. W. Richardson,* Petitioner v. *Federal Power Commission.* Petitioner will therefore refer to that Brief.

QUESTIONS PRESENTED AND ARGUMENT

The Petition in this proceeding, in Petitioner's view, raises a more fundamental and basic question than the questions listed by Respondent (Brief in Opp., p. 2). This question is whether this Honorable Court's *Phillips* decision,[1] holding the Natural Gas Act applicable to Independent Producers, and Petitioner's compliance with Sections 4 and 7 of the Natural Gas Act, relating to a sale of natural gas for a period of fixed duration undertaken prior to the date of that decision, constitutes an unlimited dedication of gas reserves to a purchaser which had only obligated itself to purchase gas for the contract term (Pet., pp. 2, 7-14). If the orders under review are sustained, Respondent will be permitted to nullify the duration terms of gas sales agreements without compliance with statutory procedural requirements. Additionally, Respondent will be defeating by administrative action, without notice and opportunity for hearing, one of the basic purposes of the Natural Gas Act, as pointed out by this Court in its *Memphis*[2] and *Mobile*[3] decisions, namely, that the Act " * * * evinces no purpose to abrogate private contracts as such."[4] With some 6,897 contract rate schedules in effect as of June 7, 1954, of which Petitioner believes a very high percentage are of fixed duration, the basic question presented is of utmost importance to the natural gas

[1] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

[2] *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, —— U.S. ——, 3 L. ed. 153, 159 (Ad. Sheets).

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

[4] Ibid., 350 U.S. at 338.

industry, and the Petition, it is respectfully urged, should not be regarded as one dealing with the validity of Respondent's regulatory action with respect to isolated sales as the listed "Questions Presented" in Respondent's Brief might suggest or as Respondent argues.[5]

With respect to the certificate requirements of Sections 7(c) and 7(e) of the Natural Gas Act and Petitioner's compliance with the requirements thereof, the basic question is whether Petitioner by applying only for a certificate to complete a sale pursuant to a contract of fixed duration and being granted a certificate " * * * authorizing the sale * * * as more fully described in the application * * * " was granted certificate authority to have a term coextensive with the term of the contract or certificate authority of unlimited duration which committed without limitation, and contrary to the specific terms of the contract, Petitioner's gas reserves from the field involved (Pet. pp. 7-10; R. 38-39, 145, 157-158). Petitioner does not contend as suggested by Respondent's first question that the termination or cancellation of the contract terminates Petitioner's certificate authority. The duration of that authority, as already set forth above, is determined from the language of the certificate. Respondent's Brief in Opposition[6] makes no reference to the foregoing limiting language of the certificate, to the requirements of Section 7(e) of the Act, that upon making the requisite statutory showings, Respondent shall issue *the certificate requested*, and to Respondent's only statutory authority to alter the

[5] See Brief in Opposition, *S. W. Richardson* v. *F.P.C.*, No. 208, October Term, 1959, pp. 2, 5.

[6] Ibid., pp. 2, 6-9.

proposal in the certificate application by conditions which Respondent did not exercise as to the duration of the sale (Pet. 7-9). Moreover, as of the date the certificate was issued, Petitioner did not and could not show ability to continue the sale after the term of the initial contract as Petitioner had no purchaser for its gas (R. 145, 43-70, 99-132).

The basic question presented by Petitioner with respect to Section 4 of the Act is whether, after a contract filed as a rate schedule has expired by its own terms, is a second contract applicable to a new and wholly unrelated sale from the same field, filed as a new rate schedule, a "change" in the first contract rate schedule. Respondent's contentions that this question should be answered in the affirmative appear to be based on the assumption that the second contract continued the first sale, and that the filing of the first contract as a rate schedule automatically committed Petitioner to continue the sale indefinitely.[7] Respondent's assumption is contrary to the terms of the contracts (R. 43-70, 99-132). For the reasons set forth in the Petition, it is respectfully submitted that the filing of the first contract does not have this effect (Pet. pp. 10-13).

The cases cited[8] by Respondent clearly do not support its contentions. This Court's recital of the facts in *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, 422-3, disclose that Respondent ordered continuance of a "practice" pursuant to Section 206 of the Federal Power Act, a section substantially identical to Section 5(a) of the Natural Gas Act.

[7] Ibid., pp. 2, 4, 5, 6.

[8] Ibid., pp. 6-8.

Assuming *arguendo* Section 5(a) would be applicable to the term of a contract rate schedule, for this decision to support Respondent's contention, Respondent would have had to order, after notice and opportunity for hearing and after making requisite findings, pursuant to the authority accorded it by Section 5(a) of the Act, that the fixed term of Petitioner's contract rate schedule be changed to a term of unlimited duration. (Pet. p. 11). The *Bel Oil*,[9] *Mississippi*[10] and *Cities Service*[11] cases cited by Respondent involved changes in contract rate schedules during the effective terms thereof as contracts and rate schedules, and clearly they are not precedents for the proposition that a new and wholly unrelated contract should be considered as a change in another contract previously filed as a rate schedule after its expiration date. Under the terms of the respective contracts or their effective dates as rate schedules, the new contract could have no effectiveness during the term of the initial contract as a contract or as a rate schedule (R. 43-73, 65; 99-131, 127).

The *Huber* case,[12] in essence, involved the unwillingness of an Independent Producer to apply for, and discharge, certificate authority to continue a sale pursuant to a contract negotiated prior to this Court's *Phillips* decision, *supra*. As of the date Petitioner's

---

[9] *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, *cert. den.* 358 U.S. 804.

[10] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388, *cert. den.* 332 U.S. 770.

[11] *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726, *cert. den.* 352 U.S. 911.

[12] *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550, *cert. den.* 352 U.S. 971.

initial contract expired, Petitioner had not only applied for a certificate to carry out its undertaking, but had discharged its obligation under the contract and the certificate, and the contract, as such, and as a rate schedule had also expired under its own terms. Similarly, as of that date, no abandonment authority was required as the "sale" for which Petitioner sought and was granted certificate authority had been completed. Here, unlike the first *Sunray case*,[13] Petitioner applied for certificate authority to complete the sale undertaken by its initial contract and was granted authority only to complete that sale.

For all the foregoing reasons and the reasons set forth in its Petition, Petitioner respectfully prays that its Petition be granted.

Respectfully submitted,

MARTIN A. ROW
EDWIN M. CAGE
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
MAY, SHANNON AND MORLEY
1700 K Street, N.W.
Washington 6, D. C.

Attorneys for Petitioner

By OMAR L. CROOK

[13] *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97 reversed in part and remanded 353 U.S. 944.

Certificate of Service

I certify that the Reply Brief of Petitioner, Sun Oil Company, was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 5th day of October, 1959.

J. Lee Rankin, Solicitor General
George Cochran Doub, Assistant Attorney General
Samuel D. Slade, Attorney
Department of Justice
Washington 25, D. C.

Willard W. Gatchell, General Counsel
Howard E. Wahrenbrock, Solicitor
Peter H. Schiff, Attorney
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

OMAR L. CROOK,
Attorney for Petitioner
Sun Oil Company

FILE COPY

Office-Supreme Court, U.S.

BRIEF OF PETITIONER

SUN OIL COMPANY

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 13 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER, SUN OIL COMPANY

MARTIN A. ROW
EDWIN M. CAGE
P. O. Box 2880
Dallas 21, Texas

LEO J. HOFFMAN
Turner, White, Atwood,
McLane and Francis
1900 Mercantile Dallas Building
Dallas 1, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement	3
Statement of Facts	3
Proceedings Before the Commission	5
Proceedings Before the Court of Appeals	10
Summary of Argument	11
I. The First Sales Contract Was Limited as to Volumes, Location and Term, and the Certificate Authorized Only That Specific Sale	16
A. Sun Sought a Certificate to Make the Sale Described in the Contract of August 26, 1947	18
B. Sun Was Granted a Certificate Only to Make the Sale Pursuant to the Contract of August 26, 1947	23
1. The Commission's findings signify Sun's certificate authorized only the sale provided for by the August 26, 1947 contract	25
2. The ordering paragraphs in Sun's certificate authorized only the sale provided for by the August 26, 1947 contract	26
3. Section 7(e) negates the construction that Sun's certificate authorized more than the sale provided for by the contract of August 26, 1947	29
4. The Commission lacked authority to condition the certificate issued to Sun to require Sun to sell gas after the expiration of the contract of August 26, 1947	30

Page

5. The Commission's apparent policy that all independent producers' certificates should be of unlimited duration, adopted after May 28, 1956, cannot be applied retroactively to Sun's certificate 31

6. Section 7(b) of the Natural Gas Act does not extend the duration of the Sale under the Contract of August 26, 1947 32

II. The First Sales Contract Expired By Its Own Terms, Both as a Contract and as a Rate Schedule, and the Sales Contract of August 1, 1957, Covering a Different Volume of Gas, Did Not Constitute a Change in Rate Schedule 38

III. The Commission's Decision Does Not Promote the Purpose of the Natural Gas Act, Is Contrary to the Regulatory Scheme of the Act, and Is Not in the Public Interest 47

Conclusion 53

Cases Cited

Andrew G. Nelson, Inc. v. U. S., 355 U.S. 554 (1958) .. 27
Atlantic Refining Co., et al. v. Public Service Commission of New York, 360 U.S. 378 (1959) 13, 16, 26, 34, 35
Atlantic Gulf Gas Co., 10 F.P.C. 79, 83 (1951) 25
Bel Oil Corporation v. F.P.C., 255 F. 2d 548 (CA-5, 1958), *cert.* denied, 358 U.S. 804 ..... 43, 44, 45
Cities Service Gas Co. v. F.P.C., 255 F. 2d 860, (CA-10, 1958) *cert.* denied 358 U.S. 837 (1958) 17
Colorado Interstate Gas Co. v. F.P.C., 142 F. 2d 943 (CA-10, 1944), affirmed 324 U.S. 581 (1945) 17
Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944) 50
Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498 (1949) 30
Gulf Oil Corporation v. F.P.C., 255 F. 2d 556 (CA-5, 1958) 22
Kansas Pipe Line Company, et al., 2 F.P.C. 29 (1945) 25

Page

Mississippi Power and Light Company v. Memphis Natural Gas Company, 162 F. 2d 388 (CA-5, 1947) 43, 44, 45
Panhandle Eastern Pipe Line Company v. Federal Power Commission, 204 F. 2d 675 (CA-3, 1953) .. 31, 37
Phillips Petroleum Company v. Wisconsin, 347 U.S. 672 (1954) 3, 5, 17
Sunray Mid-Continent Oil Company, et al., 19 F.P.C. 1107 (1958) 31
Sunray Mid-Continent Oil Company, 20 F.P.C. 824 (1958) 31
Texas-Ohio Gas Co., 12 F.P.C. 23 (1953) 26
The Central West Utilities Company v. F.P.C., 247 F. 2d 306 (CA-3, 1957) 37
United Gas Pipe Line Company v. Memphis Gas, Light and Water Division, 358 U.S. 103 ..... 13, 17, 22, 35, 36, 52
United Gas Pipe Line Company v. Mobile Gas Service Corp., 350 U.S. 332 ..... 6, 13, 15, 16, 17, 22, 35, 41, 42, 44, 45, 46, 48, 50
U.S. v. Seatrain Lines, Inc., 329 U.S. 424 (1947) 31

Constitutional Provisions:

Amendment V 3, 50

Statutes:

Act of June 25, 1948, c. 646, 62 Stat. 927, et seq., 28 U.S.C. 1251, et seq.:
Sec. 1254(1) 2

Communications Act of 1934, June 19, 1934, c. 652, 48 Stat. 1064, et seq., as amended 47 U.S.C. § 152, et seq.:
Sec. 201(a) 37
Sec. 214(d) 37

Interstate Commerce Act, Part I, February 4, 1887, c. 104, 24 Stat. 379, et seq., as amended, 49 U.S.C. § 1, et seq.:
Sec. 1(4) 37
Sec. 1(21) 37

Page

Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. § 717 et seq.:
Sec. 1(b) 12, 14, 15, 32, 39, 50
Sec. 4 ..... 4, 30, 34, 41, 42, 43
Sec. 4(c) 2, 14, 15, 39, 40, 41, 44
Sec. 4(d) 14, 15, 40, 41, 44
Sec. 4(e) 15, 42, 43
Sec. 5 ..... 2, 30
Sec. 7 ..... 2, 30
Sec. 7(a) 13, 35, 36, 37, 38
Sec. 7(b) 12, 13, 15, 31, 32, 33, 34, 35, 36, 38
Sec. 7(c) 11, 12, 13, 14, 16, 17, 18, 19, 23, 33, 34, 38, 39, 40
Sec. 7(d) 16
Sec. 7(e) 9, 12, 15, 16, 18, 19, 22, 23, 24, 25, 27, 28, 29, 31, 33, 34, 40
Sec. 19 2
Sec. 19(a) 10
Sec. 19(b) 1, 2, 10

Rules and Regulations:

Rules of Practice and Procedure, Federal Power Commission:
Sec. 1.30(c)(1) .....
Sec. 1.30(c)(2) .....
Sec. 1.32(b) .....

Regulations Under the Natural Gas Act, Federal Power Commission:
Sec. 154.91 et seq. 3
Sec. 154.91 ..... 3, 5
Sec. 154.92 5
Sec. 157.23 et seq. 3, 5, 19
Sec. 157.23 ..... 3, 5
Sec. 157.24 5
Sec. 157.24(a)(4) 19, 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF PETITIONER, SUN OIL COMPANY

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit (R. 146-153, 153-164) are reported at 266 F. 2d 222-232. The order of the Federal Power Commission (in the form of a letter) issued September 12, 1957 (R. 123-124) is not yet reported. The order of the Federal Power Commission issued November 8, 1957 (R. 136-137) is reported at 18 F.P.C. at pages 611-612.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (R. 164). The petition for a writ of

certiorari was filed on August 18, 1959. A writ of certiorari was granted November 9, 1959. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Does compliance with the certificate and rate filing requirements of Sections 4 and 7 of the Natural Gas Act with respect to a sale of gas of specific quantities for a specifically limited period of time, with no dedication of gas reserves involved, constitute a commitment to render a sale or service to the public forever?

2. Does an order issued under Section 7 of the Natural Gas Act authorizing a sale described in an application for certificate and granting the application, which requests authority *only* to continue a sale pursuant to a gas sales contract of specifically limited duration, constitute the certificate one of unlimited duration requiring a perpetual sale or service?

3. Does a new gas sales contract, filed as a new initial rate schedule pursuant to Section 4(c) of the Natural Gas Act, constitute a change in an unrelated expired sales contract which was previously filed as a rate schedule and under which the sale has been completed?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and Sections 1, 4, 5, 7 and 19 of the Natural Gas Act, as amended (15 U.S.C. §§ 717b, 717c, 717d, 717f, 717r), Sections 1.30 and 1.32 of the Commission's Rules of Practice and Procedure,

and Sections 154.91, *et seq.*, and 157.23, *et seq.*, of the Regulations under the Natural Gas Act, pertinent provisions of which are printed in Appendix, pp. 55-68.

STATEMENT

Statement of Facts: Some fourteen months before the Federal Power Commission (Commission) instituted its investigation on October 28, 1948,[1] of Phillips Petroleum Company to determine whether that company was subject to the Natural Gas Act, and some seven years before that investigation culminated in the Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), Sun Oil Company (Sun) on August 26, 1947, entered into a contract for the sale of natural gas produced from leasehold interests in the Gwinville Field in Mississippi to Southern Natural Gas Company (Southern Natural) (R. 32-52).

Sun and Southern Natural limited the sale to a period of years. Article XIV of the contract provided that the "* * * agreement shall remain in force and effect for a period of ten (10) years, commencing on the date on which the first delivery of gas is made by Seller [Sun] to Buyer" [Southern Natural] (R. 48).[2]

By Article XI of the contract, Sun specifically agreed to sell specified volumes of gas and Sun did not commit its gas reserves to the sale:

> "In this connection, it is understood that by this agreement Seller is not dedicating to Buyer,

[1] 347 U.S. at 675.

[2] Options were also included in the contract for an earlier termination date (*e.g.*, See Art. III (R. 34); Art. XI (R. 46); Art. XII (R. 47-48)). None of the options were exercised.

> or to Buyer's market outlet, any portion of Seller's gas reserves in the Gwinville Gas Field or any portion of the gas produced by Seller from its wells in said field, but that Seller is simply selling and Buyer is purchasing the quantity of gas called for in this agreement on the terms specified in this agreement and for the price set out above; * * *." (R. 46).

The first delivery of gas was made September 3, 1947 and the sale provided for therein was to be and was in fact completed at the end of the agreed term of 10 years from that date (R. 128).

As of August 1, 1957 Sun and Southern Natural entered into a contract for a new and different sale of natural gas from the Gwinville Field (R. 62-85). The term of this contract was for a period of twenty years "from and after September 3, 1957" (R. 82). It was the intent of the parties, as the provisions of the contract plainly show, that the new sale should commence the day after the initial sale was completed. Additionally, the terms of the two contracts differed in substantial ways, and the differences are readily apparent (R. 32-52, 62-85). The provisions for term [10 years versus 20 years (R. 48, 82)], contract quantities [20% of total line requirements versus a daily average equal to 66⅔% of deliverability of Sun's wells (R. 35, 64)], price [7½c-8c per Mcf in two steps versus 20c-23c per Mcf in four steps (R. 46, 77)], quality [natural state versus specified standards, including minimum Btu content (R. 40, 76)], delivery conditions (R. 40, 75), among others, vary substantially.[3]

---

[3] Parenthetical comparisons are general and do not include all terms.

Proceedings before the Commission: After this Court's *Phillips* decision[4] the Commission promulgated its No. 174 series of orders (18 C.F.R. § 154.91, *et seq.*, § 157.23, *et seq.*). The order then in effect, No. 174-A, required every independent producer, a term defined by § 154.91 of the Commission's Regulations under the Natural Gas Act "who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission" to file with the Commission an application for a certificate of public convenience and necessity in accordance with § 157.24 through § 157.27 of such regulations and a rate schedule setting forth "the terms and conditions * * * and all rates * * * for such * * * sale effective on June 7, 1954."[5]

On November 30, 1954, Sun filed with the Commission an application for a disclaimer of jurisdiction or, in the alternative, an application for a certificate of public convenience and necessity (R. 26-31). In such application Sun recited that "Sun was, on June 7, 1954, and now is, delivering gas subject to the contract with the following Purchaser: Southern Natural Gas Company, which contract has either been heretofore filed, or is being filed contemporaneously herewith, as a rate schedule" (R. 28). The Commission found that the contract of August 26, 1947 was thereby incorporated by reference as a part of the application (R. 124). Sun also set forth therein that "This application is hereby made *only* for a certificate of public convenience and necessity authorizing *the sale* of nat-

[4] *Phillips Petroleum Company* v. *Wisconsin*; 347 U.S. 672.

[5] Order 174-A issued August 6, 1954, §§ 154.92, 157.23.

ural gas in the circumstances above described"[6] (R. 29).

On November 30, 1954 Sun filed the sales contract of August 26, 1947 and amendments thereto as its rate schedule (R. 24; 32). Thus, the terms of the contract of August 26, 1947, including the termination date and Sun's limited undertaking to deliver volumes of gas, became the terms of the rate schedule.

The Commission accepted the contract as Sun's F.P.C. Gas Rate Schedule No. 55 (R. 32; 93-95). Throughout the entire effective term of the rate schedule, the Commission took no action, under its "rate-review powers,"[7] to modify the term of the contract or the undertaking of Sun only to sell specifically limited volumes of gas for a specifically limited period. After the rate schedule expired by its own terms on September 3, 1957, the Commission took action on September 12, 1957, detailed below (R. 123-124). This action had the effect of deleting the term of the rate schedule and converting the limited undertaking to sell specific volumes of gas for a specific period to an unlimited dedication of Sun's leases and the production therefrom to a sale to Southern Natural. The authority of the Commission to take this action is one of the controverted issues in this proceeding.

On April 19, 1956, the Commission gave notice of the filing of the certificate application (21 F.R. 2706). Such notice fixed May 21, 1956 as the date for the hearing thereon, and indicated that, in the absence

---

[6] Emphasis is added unless otherwise indicated.

[7] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

of opposition to the application, the Commission would dispose of it pursuant to the provisions of Sections 1.30(e)(1) or 1.30(e)(2) of the Commission's Rules of Practice and Procedure and that unless otherwise advised, it would be unnecessary for applicants to appear or be represented at the hearing [8] (21 F.R. 2707). The hearing was held on May 21, 1956, as a non-contested proceeding, and the Commission disposed of the matter upon the basis of the pleadings (Sun's application (R. 99-112).[9] Since Sun's application constituted the sole evidence as to Sun's sale, there was not one iota of evidence before the Commission to indicate that Sun was either able or willing to sell any quantities of gas, from any gas reserves, or for any period of time other than as specifically set forth in the gas sales contract of August 26, 1947.

On the basis of Sun's verified application, the Commission by order issued May 28, 1956 issued Sun a certificate (R. 99-112). The legal effect of that certificate, as well as the Commission's contention that Sun had an obligation to continue the sale of gas to Southern Natural, after the date of the expiration of the sales contract of August 26, 1947, are also controverted issues in this proceeding.

---

[8] In part, the Notice provided: "*Provided, however*, That the Commission may, after a non-contested hearing, dispose of the proceedings pursuant to the provisions of Section 1.30(e)(1) or (e)(2) of the Commission's Rules of Practice and Procedure. Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicants to appear or be represented at the hearing."

[9] In a proceeding of this type the matter is disposed of upon consideration of the pleadings. Section 1.32(b) of the Rules of Practice and Procedure.

As of the date the Commission issued to Sun the certificate described in the preceding paragraph the new contract between Sun and Southern Natural dated August 1, 1957 was not in existence. After that contract was executed, Sun on August 13, 1957 filed an application for disclaimer of jurisdiction, or in the alternative, and application for a certificate of public convenience and necessity. In this application Sun sought authority, alternatively, to sell and deliver gas under the terms of the second contract dated August 1, 1957 (R. 115-121). By this application, Sun sought to commence a new and different sale to Southern Natural "from and after September 3, 1957." At the same time, on August 13, 1957, Sun filed its new contract of August 1, 1957, but not effective by its own terms until "from and after September 3, 1957," as a rate schedule applicable to the sale proposed by the certificate application filed on the same date (R. 82; 113-115).[10]

By the letter order issued September 12, 1957, the first order reviewed by the Court of Appeals, the Commission *rejected*, without notice and opportunity for hearing, the certificate application and the contract of August 1, 1957, filed as a rate schedule (R. 123-124). The Commission's rejection of the rate schedule filing was without prejudice to Petitioner's refiling the contract of August 1, 1957 as a *change* in the first rate schedule, consisting of the contract of August 26, 1947. The latter contract had expired and had no force and

---

[10] The Commission, in rejecting this filing (R. 123-124), returned all copies of the contract to Sun (R. 123-124). The filing date shown on the contract at page 61 of the record is the date such contract was filed, under protest and reserving all rights, to contest the order of September 12, 1957, as a "notice of change."

effect the day before the contract of August 1, 1957 became effective by the terms thereof (R. 82, 124).

In the letter order of September 12, 1957, the Commission stated that the certificate application filed August 13, 1957, requesting authority to make the sale contemplated by the contract of August 1, 1957, duplicates the acreage covered by the certificate in Docket No. G-6658 (*i.e.*, the certificate issued May 28, 1956, with respect to the contract of August 26, 1947) and that the previously issued certificate is still applicable to gas sales from the leases involved even though the contract of August 26, 1947 has expired (R. 123-124). Thus, the Commission purported to hold that the certificate theretofore issued to Sun required that Sun render a continuous service forever, in complete disregard of the specific limitations contained in Sun's application for a certificate, in complete disregard of the specific limitations contained in the certificate itself, in complete disregard of the complete absence of evidence in the record to indicate that Sun was either able or willing to do more than it had contracted to do, and in complete disregard of Section 7(e) of the Natural Gas Act.

The order issued September 12, 1957 also held that the new contract of August 1, 1957, filed as a rate schedule (which had no effectiveness until the contract dated August 26, 1947 had expired) duplicates the sale pursuant to the earlier sales contract of August 26, 1947, and that the prices in the August 1, 1957, contract embody a change in the effective rates set forth in the earlier rate schedule consisting of the contract of August 26, 1947. Thus, the Commission purported to hold that Sun's rate schedule continued in effect thereafter, in complete disregard of the fact that it had obviously expired by its own terms.

On October 10, 1957 Sun, under protest and with a reservation of all rights to contest the order issued September 12, 1957, filed the contract dated August 1, 1957 as a change in the rate schedule consisting of the expired contract of August 26, 1947 (R. 87-89; 136). By an order issued November 8, 1957, the second order reviewed by the Court of Appeals, the Commission suspended the effectiveness of the contract as a change in rate schedule for a full five month period. Such order purports to continue all the terms of the August 26, 1947 gas sales contract in effect, subject to Sun's right to place the new rates and other provisions in effect pursuant to the provisions of Section 4(e) of the Act, and ordered a hearing with respect thereto under the provisions of Sections 4 and 15 of the Natural Gas Act (R. 136-140).

Pursuant to the provisions of Section 19(a) of the Natural Gas Act, Sun, on October 10, 1957, filed a timely application for rehearing with respect to the order of September 12, 1957 (R. 124-133). The Commission considered this application for rehearing as a motion for reconsideration and denied it by an order issued November 8, 1957 (R. 133-135). Sun also filed on December 2, 1957 an application for rehearing with respect to the suspension order of November 8, 1957 (R. 140-144).[11] By a letter dated December 10, 1957, the Commission rejected this application for rehearing (R. 145).

Proceedings before the Court of Appeals: On January 6, 1958, Sun filed, pursuant to Section 19(b) of the Natural Gas Act, a petition to review the Commis-

[11] Sun sought review of this order on the grounds, among others, that the action taken therein was predicated on the action taken by the Commission's letter order of September 12, 1957 (R. 142).

sion's order of September 12, 1957 and the suspension order of November 8, 1957 (R. 4-18; 19). After hearing, the Court, with Judge Brown dissenting, affirmed the Commission's orders (R. 146-153; 153-164). Judgment was entered on April 17, 1959, and Sun's petition for rehearing was denied June 3, 1959 (R. 164-165). A petition for a writ of certiorari was filed August 18, 1959 and granted November 9, 1959 (R. 165).

SUMMARY OF ARGUMENT

I. Sun filed an application for a certificate of public convenience and necessity as required by Section 7(c) of the Natural Gas Act requesting authority only to make a sale of natural gas pursuant to the gas sales contract of August 26, 1947, the only acts or operations Sun had undertaken on June 7, 1954. The gas sales contract provided for a precisely specified term.

The certificate of public convenience and necessity issued to Sun by the Commission's order of May 28, 1956, only authorized Sun to sell the specific volumes of gas specified, and for the term specified, in the contract of August 26, 1947.

The findings in the order of May 28, 1956 only relate to that sale, because that was the only sale involved and because Sun was only able on that date to show ability to make deliveries of the volumes specified, and for the term specified, in that contract. As of that date the Commission could only have evaluated the factors bearing on the public interest with respect to the sale set forth in that contract.

The ordering paragraphs of the order issued May 28, 1956, only authorized the sale of natural gas "as more fully described in the application * * *." They

do not authorize a service, but only a "sale", one of the "acts or operations" specifically recognized by Sections 7(c) and 7(e) as being subject, separately and distinctly, to the Commission's jurisdiction, and an act recognized by the Natural Gas Act as the jurisdictional activity of the seller under a gas sales contract.

The Commission did not purport to condition the "sale" authorized by the certificate or in any way purport to require Sun to sell volumes of gas in excess of those specified in the sales contract or for a term in excess of that specified. Moreover, even if it had purported to do so, the Commission is not authorized under Section 7(e) of the Act to extend the sale beyond the "whole" of the sale covered by the application, which only sought authority to make the sale pursuant to the sales contract of August 26, 1947. In addition, to have required the sale of volumes of gas beyond those undertaken by the contract of August 26, 1947, would have required Sun to produce additional volumes of gas, a requirement which is prohibited by Section 1(b) of the Act which specifically exempts the production of gas from the Commission's jurisdiction.

Section 7(b) of the Act does not extend the duration of the sale under the contract of August 26, 1947 or the duration of the certificate authorizing such sale. Sun has not sought or proposed to abandon anything, for, upon completion of the sale as authorized by the certificate, the sale and certificate were at an end, and there was no longer any sale or any obligation to sell which could be abandoned. The "facilities" and "service" referred to in Section 7(b) clearly are not greater in scope than facilities, acts and operations which are required to be certificated under

Section 7(c) of the Act. As the primary affirmative jurisdiction is exercised under Section 7(c), Section 7(b) can not encompass more than Section 7(c), and, at the very most, Section 7(b) relates only to the abandonment of that which is certificated under Section 7(c) during the effective term of the certificate. Hence, when the sales contract and the certificate authorizing that sale expired, the jurisdictional act came to an end. This interpretation is in keeping with the Court's holding in CATCO,[12] and to apply Section 7(b) to a completed "certificated" sale would clearly have the effect of requiring a further sale in contravention of the certificate requirements of Section 7(c). Also, CATCO[13] indicates that only the specific supply of gas previously dedicated by the certificate procedure requires authority to abandon.

Extending the term of Sun's sale by the application of Section 7(b), or by any other means, in this proceeding would be contrary to the Congressional intent expressed in the Act and the determinations of this Court in the *Mobile* and *Memphis* decisions,[14] that the Act evinces no purpose to abrogate private rate contracts. To apply Section 7(b) in this proceeding would also be contrary to the policy of Congress which restricts the Commission's jurisdiction over the initiation of sales and extensions of facilities to that set forth in Section 7(a) of the Act.

---

[12] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

[13] *Ibid.*

[14] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Company* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103, 109-110 (1958).

Therefore, when Sun's first contract expired, the sale made thereunder and the certificate authorizing such sale likewise came to an end, and the Commission could not lawfully reject Sun's application covering another separate and distinctly different sale.

II. Sun's contract of August 26, 1947, expired by its own terms both as a contract and as a rate schedule and the new sales contract of August 1, 1957, effective after the contract of August 26, 1947, expired, did not constitute a "change" in the contract of August 26, 1947 or in the rate schedule consisting of such contract.

The rate-filing provisions of Section 4(c) in which are incorporated by reference the various jurisdictional provisions of the Act, including Sections 1(b) and 7(c), require a separate and distinct initial rate filing with respect to "any * * * sale * * * subject to the jurisdiction of the Commission." The contract of August 26, 1947 filed as Sun's initial rate schedule contained all the terms and conditions of the sale made pursuant thereto. Hence, when the term of the contract expired, in the circumstances of this case, the rate schedule consisting of the contract also expired.

Section 4(d) of the Act, relating to the filing of "changes" in rate schedules, is concerned only with changes in schedules filed pursuant to Section 4(c) which are related to the same sale during its effective term and during the effective term of the rate schedule itself. Sun's contract of August 1, 1957 met neither of these criteria since it related to an entirely separate and distinct sale, and the contract of August 26, 1947, as a contract and as a rate schedule, had expired prior to the date the contract of August 1, 1957 had effect either as a contract or as a rate schedule.

Under this Court's *Mobile* decision,[15] the Commission is accorded only rate review powers, and the rate-making and rate-changing powers remaining with the natural gas companies, and the Commission lacks authority summarily to delay the effectiveness of the August 1, 1957 contract or to extend the term of the August 26, 1947 contract.

The Court below erroneously assumed that the August 1, 1957 contract continued a "service" undertaken by the contract of August 26, 1947. Neither contract related to a "service." Each related to a distinct and unrelated sale. Moreover, the assumption is clearly contrary to this Court's *Mobile* decision[16] that private contracts underlie the whole scheme of regulation and are modified *only* by the Commission's lawful exercise of its rate review authority.

Therefore, the Commission unlawfully rejected the filing of Sun's second contract as an initial rate schedule.

III. The Commission's decision does not promote the purpose of the Natural Gas Act, it is contrary to the regulatory scheme of the Act, and it is not in accord with the public interest. The Commission in this proceeding clearly has not adhered to the regulatory scheme of the Act. It has made no attempt to evaluate the second sale but has erroneously applied its powers under Sections 4(e) and 7(b) of the Act, and exercised power which Congress specifically excluded by Sections 1(b), 4(c), 4(d), 4(e) and 7(c) of the Act.

---

[15] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[16] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The Commission's action also is contrary to the foundation principle, as determined by this Court's *Mobile* and *Memphis* decisions,[17] that the Act evinces no purpose to abrogate private contracts, as such, and that Congress sought to attain this aim of the Act, among other ways, by preserving the integrity of private contractual arrangements for the supply of natural gas. The protection of this basic and fundamental concept of the Act is required by independent producers if they are to provide the sources of natural gas which are vital to the social, economic and general welfare of the United States.

I.

THE FIRST SALES CONTRACT WAS LIMITED AS TO VOLUMES, LOCATION AND TERM, AND THE CERTIFICATE AUTHORIZED ONLY THAT SPECIFIC SALE

The certificate issued to Sun on May 28, 1956 was pursuant to Sections 7(c), 7(d), and 7(e) of the Natural Gas Act. The requirement to obtain certificates is set forth in Section 7(c). In part, it provides that no natural-gas company or person which will be a natural-gas company "* * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *." Under the plain language of this requirement an applicant has the right to propose in an application the terms and the conditions of the sale in which the applicant proposes to engage. *Atlantic Refining*

---

[17] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956); *United Gas Pipe Line Company* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103, 113-114 (1958).

Co., et al. v. *Public Service Commission*, 360 U.S. 378, 387-8 (1959).

Sun's first sales contract with Southern Natural dated August 26, 1947, was entered into prior to the date of this Court's *Phillip* decision, June 7, 1954.[18] The contract provided for a definite, limited term, and under the law of contracts all rights, duties and obligations thereunder were discharged by performance at the end of the term. Restatement, Contracts, § 386 (1932). Under this Court's *Phillip* decision[19] the sale provided for by the sales contract of August 26, 1947, was subjected to the requirements of the Act. However, the terms of the contract and the sale were not modified by the Act, nor were Sun's obligations in the contract to sell natural gas to Southern Natural increased or modified in any way. *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 109-110 (1958); *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F.2d 943, 954 (CA10-1944), affirmed 324 U.S. 581 (1945); *Cities Service Gas Co.* v. *F.P.C.*, 255 F.2d 860, 864 (CA10-1958), *certiorari* denied 358 U.S. 837 (1958).

Upon the sale becoming subject to the requirements of the Act, however, Sun was required to comply with the above quoted requirement of Section 7(c) and to obtain a certificate authorizing that sale. As of June 7, 1954, and as of May 28, 1956, the date Sun's certificate was issued, Sun's only undertaking to sell gas was set forth in the contract of August 26, 1947. That

[18] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

[19] *Ibid.*

undertaking only required the delivery of limited volumes of gas for a limited term (R. 46, 48). Under such requirements of Section 7(c) and the Commission's Rules Sun was only required to and did seek a certificate authorizing only such sale. This is so because with respect to Sun Section 7(c) speaks only of, and requires a certificate only for, the act of engaging in a "sale," such as was represented by Sun's then existing gas sales contract having a limited term. Section 7(c) is certainly not subject to the interpretation that when a sale is made or proposed, regardless of its terms, a certificate is required to be secured for a perpetual sale or service. Moreover, on these dates Sun could not, and did not, do more than meet the requirements of Section 7(c) of the Act, which provides that the certificate "shall be issued * * * authorizing the whole or any part of the * * * sale, * * *" and no more, "* * * if it is found that the applicant is able and willing properly to do the acts * * * proposed * * *." Sun obviously could not, and did not, apply for any certificate to sell any gas other than that specifically described in its contract, because it then had no market and no sales contract for other gas. Hence, it could not request a certificate authorizing more than the "whole" of its then existing sale, nor could it show that it was "able and willing" to do more than continue and complete its then existing sale.

A. Sun Sought a Certificate to Make the Sale Described in the Contract of August 26, 1947.

Sun sought a certificate to complete the sale pursuant to the sales contract of August 26, 1947. There has been no suggestion that Sun failed in any respect to comply fully with the applicable rules of the Com-

mission. The Court below, however, erroneously found that there was "* * * nothing to show any intent of the Petitioner [Sun] to apply for a limited or conditional certificate, * * *" (R. 151). The fallacy in this statement of the Court below is that Sun did not seek a "limited or conditional" certificate. It sought precisely what Section 7(c) of the Act requires—a certificate authorizing the very sale it had made under the sales contract of August 26, 1947—no more and no less. Sun's application was, of absolute necessity, limited to the contract, and the certificate thereafter issued by the Commission was, of necessity, limited to the sale "as hereinbefore described." Nothing more was either required or permitted by law, inasmuch as Section 7(c) of the Act requires that the certificate "shall be issued * * * authorizing the whole or any part of the * * * sale * * *." A certificate purporting to authorize a perpetual sale or service (which, in truth, would have been the "conditional" certificate in Sun's circumstances) would cover more than the "whole" of the sale by contract, and this is forbidden.

The Commission's applicable[20] rules, and particularly Sections 157.24(a)(4), require that the applicant shall set forth "A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company." Additionally such

[20] 18 C.F.R. § 157.23, *et seq.*

section requires certain specific data which are set forth below.[21]

There is no requirement in this section that an applicant should specify the date the sale would terminate. The requirement for the basic jurisdictional statement is not particularized.

In addition to setting forth in its certificate application the specific information required by Section 157.24(a)(4), it was therein set forth that "Sun was,

[21] "A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

"(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

"(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

"(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

"(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

"(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects."

on June 7, 1954, and now is, delivering gas subject to the contract with the following Purchaser: Southern Natural Gas Company, which contract has either been heretofore filed, or is being filed contemporaneously herewith, as a rate schedule" (R. 28). The contract of August 26, 1947, was thereby incorporated in the certificate application (R. 124).

The contract, as an integral part of the application, specified with particularity the terms and conditions of the sale for which certificate authority was sought. Even a cursory examination of the contract will show that deliveries under the contract were *only* to continue for the term fixed by the contract and that Sun was *only* selling "the quantity of gas called for in this agreement on the terms specified in this agreement * * *" (R. 48, 46). The application also called attention to the limited nature of the sale for which Sun was seeking certificate authority by the following statement: "This application is hereby made *only* for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described" (R. 29). This statement appeared in the application after Sun had set forth all details required by Section 157.24(a)(4) and before the prayer of the application which, alternatively, prayed for a certificate as "herein requested."

The contract of August 26, 1947, incorporated in the application by reference, related to a "sale" of natural gas. As pointed out in Judge Brown's dissent, "sale" is a word of precise legal import, both in law and equity, and means, at all times, a contract between the parties, to give and pass rights of property for money—which the buyer pays or promises to pay the seller for the thing bought and sold (R. 159). More-

over, it is a matter of common knowledge that independent producers sell gas evidenced by contracts. Thus, the Court of Appeals for the Fifth Circuit, in *Gulf Oil Corporation* v. *F.P.C.*, 255 F.2d 556, 557 (CA5-1958), pointed out that independent producers "* * * are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public."

Section 7(c) of the Act provides that, if the other requirements are met, a certificate shall be issued for each "sale" or "service." Congress clearly intended to distinguish between a "sale" and a "service," else it would not have used the two terms separately and disjunctively. Obviously, Sun could not and did not apply for a certificate to render a "service" because Sun had no "service" contract. Sun had only a contract for the "sale" of a specifically limited quantity of gas at a specifically described location, deliverable over a specifically limited term.

The Natural Gas Act does not define the term "sale" nor is there any suggestion that that term as used therein is to have a meaning other than its accepted legal meaning. This Court in two decisions[22] issued since the Act was found applicable to independent producers, has pointed out that the Act evinces no purpose to abrogate private rate contracts as such. By incorporating the contract in the certificate application, and by specifically referring to the contract as containing the details of the "pertinent facts" of the jurisdictional statement, there can be no question, under the meaning of the word "sale" and the recog-

[22] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 109-110 (1958).

nized character of an independent producer's activities, that Sun only sought a certificate to make the sale described in the contract and that Sun was *not* seeking to dedicate leases or provide a service.

Now, at this late date, long after the hearing on May 21, 1956, a hearing as to which Sun was notified by the Commission that it was not necessary for Sun to appear or be represented, the Commission apparently takes the obviously erroneous position that a contract for a "sale" of a specific volume of gas, from specific properties, and for a specific term, is not a contract for such a "sale" at all, but is rather a perpetual "service" contract. The Commission now apparently takes the further obviously erroneous position that Sun's application for a certificate to make only the specific "sale" covered by the specific contract, did not represent what it set forth, but that in reality it was an application for a certificate to perform a perpetual unlimited "service." This, despite the fact that Sun had no unlimited perpetual "service" contract and could not, under the Act and the Commission's Regulations, apply for a certificate to do more than it had contracted to do. Finally, the Commission now apparently takes the obviously erroneous position that its certificate issued to Sun, authorizing the sale "as hereinbefore described," did not mean what it said, but was, instead, a certificate not only authorizing, but also requiring, an unlimited, perpetual, and impossible "service."

B. Sun Was Granted a Certificate Only to Make the Sale Pursuant to the Contract of August 26, 1947.

Sections 7(c) and 7(e) of the Act set forth the procedures to be followed by the Commission in processing certificate applications. Section 7(c) of the

Act requires that applications for certificates (other than for temporary certificates) shall be set for hearing and the "* * * application *shall* be decided in accordance with the procedure provided in subsection (e) of this section and such certificate *shall be issued or denied* accordingly; * * *". Section 7(e), in part, provides that

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

Section 7(e) also provides that the Commission "* * * shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Sun was granted a certificate of public convenience and necessity by the Commission's order dated May 28, 1956 (R. 99-110). As set forth in the statement above, the notice of hearing with respect to the applications of Sun and others indicated that the Commission would go through the formal procedures of a hearing, and would, as it did, dispose of the applications upon consideration of the pleadings (the ap-

plications), and grant the applications on the basis of the facts set forth therein (21 F.R. 2707; R. 109). The only description of the sale in the certificate order of May 28, 1956, other than by references to applications, is found in the caption, listing applicants—the sellers—and a listing, by docket numbers, of the fields from which gas is sold and the buyers (R. 102-108). This description does no more than identify the applications. The finding and ordering paragraphs make specific references to the applications, and state the "sale of natural gas" is "more fully described" therein. Thus, in reality, Sun's application became a part of its certificate. Hence, resort to Sun's application is appropriate and necessary to determine the authority Sun received by the Commission's Order of May 28, 1956 (R. 109-110).

1. *The Commission's findings signify Sun's certificate authorized only the sale provided for by the August 26, 1947 contract.* The order issued May 28, 1956, appears to make the requisite statutory finding that Sun was "able and willing" to do the acts proposed (R. 109). It did not find that Sun was "able and willing" to do any more than the acts proposed. As of May 28, 1956, Sun was able to carry out the undertaking in its contract of August 26, 1947. On that date, however, Sun was *unable*, and did not, and could not, show ability to do more than comply with the sales contract, and it did not, and could not, show ability to perform a perpetual "service" because Sun had no perpetual "service" contract.

One of the criterion under Section 7(c) for showing ability is to prove the availability of a market for gas to be sold. *Re Kansas Pipe Line Company, et al.* 2 F.P.C. 29, 45 (1945); *Re Atlantic Gulf Gas*

Co., 10 F.P.C. 79, 83 (1951); *Re Texas-Ohio Gas Co.*, 12 F.P.C. 23, 29 (1953). Southern Natural was not obligated on that date to purchase gas from Sun beyond the specific limitations and requirements of the sales contract of August 26, 1947. Under these circumstances, the finding with respect to Sun's ability "to do the acts * * * proposed" could only relate to the contract of August 26, 1947.

The Commission also found that the sale of natural gas by Applicant was required by the public convenience and necessity (R. 109). Under the Court's *CATCO* decision,[23] this finding requires an evaluation of "all factors bearing on the public interest" (360 U.S. at 391). As of May 28, 1956, the Commission could only have evaluated the factors set forth in the contract of August 26, 1947.

2. *The ordering paragraphs in Sun's certificate authorized only the sale provided for by the August 26, 1947 contract.* Paragraphs (A) and (C) of the order of May 28, 1956, which follow, set forth the authority accorded Sun:

> "The Commission ORDERS:
>
> "(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the *sale* by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, *as hereinbefore described and*

[23] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

as more fully described in the application and exhibits in this proceeding.

"* * *

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission." (R. 109-110)

It should be noted that the certificate did not even authorize, much less require, a "service," as the Commission now contends was the effect of its certificate. It authorized only the "sale * * * as more fully described in the application and exhibits in this proceeding" (R. 109-110). Section 7(c) of the Act clearly contemplates an application and a certificate for either a "sale" or a "service," but nowhere does the Act contemplate that, long after an application for a certificate for a specific "sale," and the issuance of a certificate for a specific "sale," the Commission may change its position and conclude that it issued a certificate for a perpetual "service," despite the total absence of any evidence authorizing such a conclusion, and despite the total absence of any application for a certificate for a perpetual "service."

The ordinary meaning of the words used in a certificate are controlling in determining their meaning. There is no ambiguity in the Commission's description of the "sale." "[T]he sale of natural gas * * * as more fully described in the application * * *" means only the "sale" which is the subject of the only gas sales contract involved and the only one in evidence in the proceeding. *Andrew G. Nelson, Inc.* v. *U. S.*, 355 U.S. 554; 557-558 (1958). It could not possibly refer

to some nebulous perpetual "service agreement" which did not even exist, and which is even now only a creature of the Commission's latter-day imagination.

Paragraph (A) issued a certificate authorizing, without modification, the sale described in Sun's application, upon the terms and conditions of the order. The only sale described in the application is the sale pursuant to the contract of August 26, 1947.

The Commission apparently contends that Sun did not apply for a certificate "limited as to time," and that, therefore, the certificate issued was not so limited. But that position patently begs the issue and overlooks and ignores the fact that Sun had only a contract of sale strictly limited as to volume, location and time; the fact that Sun applied only for a certificate to make the "sale" specifically created by that contract and could not, and did not, apply for a certificate to render a perpetual "service;" the fact that there was no evidence in the proceeding supporting a certificate for a perpetual "service," as distinguished in Section 7(c) of the Act from a "sale;" the fact that Section 7(c) specifically *requires* that the Commission *shall* issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *;" and the fact that the Act does not even contain authority for the issuance of a certificate for more than the sale covered by the application, as distinguished from authority to limit or condition the certificate applied for.

The Commission may also contend that its certificate was for a perpetual "service" because of the provisions of ordering Paragraph (C), which is quoted above. But it is apparent that the only "acts or operations" authorized by the certificate in so far as

Sun's proceeding was concerned, were those pertaining to the "* * * sale * * * as more fully described in the application * * *." It obviously follows that the certificate was effective only so long as Sun continued that "sale" during the term of its gas sales contract.

3. *Section 7(e) negates the construction that Sun's certificate authorized more than the sale provided for by the contract of August 26, 1947.* Under the language of Section 7(e) quoted above, the Commission is required to follow certain procedures with respect to a certificate application, and, if the applicant makes the requisite showings, the Commission is required to issue a certificate "* * * authorizing the whole or any part of the * * * sale * * * covered by the application * * *." Under this provision of 7(e) the Commission is not authorized to issue a certificate which would extend a sale beyond that covered by the application since such a certificate would cover more than the "whole or any part" of the sale which is the subject of the application. Under this requirement, it may be presumed that there is no intention to extend the certificate beyond the request in the application unless specific, reasonable and lawful conditions are incorporated in the order granting the certificate pursuant to the authority given in Section 7(e) to attach reasonable conditions. If reasonable and lawful conditions are intended, it may also be presumed that they would be set forth in unambiguous language and ample opportunity accorded to accept or reject them. The language of the certificate, as discussed above, does not justify a conclusion that the Commission intended to extend the certificate authority beyond that requested in the application.

4. *The Commission lacked authority to condition the certificate issued to Sun to require Sun to sell gas after the expiration of the contract of August 26, 1947.* To require Sun to continue the sale after the expiration of the contract of August 26, 1947, would require Sun to produce gas in excess of the "quantity of gas called for in this agreement" (R. 46). Moreover, a provision in a sales contract limiting the term is just as much a quantity limitation as are the specific quantity provisions. In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 505, 507 (1949), the Court held that Section 1(b) of the Act "* * * excluded the Commission from exercising *any* direct control or regulation over the actual production * * * of natural gas." Moreover, this Court pointed out that "* * * leases are an essential part of production" and that "Sections 4, 5 and 7 [of the Act] do not concern the production or gathering of natural gas; rather they have reference to the interstate sale and transportation of natural gas and are so limited by their express terms." Thus, had the Commission conditioned the certificate to require a sale beyond the date Sun had obligated itself to deliver volumes of gas, which the Commission did not do, such a condition would have exceeded the Commission's authority.

The condition would be unlawful because the Commission would thereby purport to compel the production and gathering of additional gas beyond the terms and duration of the sales contract, and this the Commission is prohibited from doing in the light of the "production or gathering" exemption of Section 1(b) of the Natural Gas Act. That the "production or gathering" exemption of Section 1(b) is applicable to this type of situation is also made clear in *Pan-*

handle Eastern Pipe Line Company v. *Federal Power Commission*, 204 F.2d 675, 680 (CA3-1953).

Additionally, the power accorded the Commission to attach reasonable conditions by Section 7(e) of the Act is limited by and must be read in conjunction with the Commission's power to authorize "* * * the whole or any part of the * * *" sale covered by the application. The authority to attach conditions clearly was not intended to authorize the Commission to extend a fixed term sale beyond the term thereof or to convert an obligation to sell specific volumes of gas to a dedication of the leases for so long as natural gas may be produced therefrom.

5. *The Commission's apparent policy that all independent producers' certificates should be of unlimited duration, adopted after May 28, 1956, cannot be applied retroactively to Sun's certificate.* For the reasons set forth above, the certificate issued May 28, 1956 *only* authorized the sale described in Sun's application. Under these circumstances, the Commission may have applied retroactively in this case a policy later announced that independent producers' certificates should not be limited in term.[24] This policy appears to be predicated on the erroneous construction by the Commission of the place of Section 7(b) in the regulatory scheme contemplated by the Natural Gas Act as discussed below. In any event, the Commission is not authorized to modify retroactively by the adoption of a new policy the certificate issued to Sun. *U. S.* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947).

[24] *See Re Sunray Mid-Continent Oil Company, et al.*, 19 F.P.C. 1107, 1108 (1958); *Re Mid-Continent Oil Company*, 20 F.P.C. 824, 826 (1958).

6. *Section 7(b) of the Natural Gas Act does not extend the duration of the Sale under the Contract of August 26, 1947.* It is shown above that Sun's certificate authority with respect to the sales contract of August 26, 1947 was co-extensive with the term of that contract. Accordingly, when the certificate authority terminated on the date as of which the sale was completed and the contract expired by reason of performance, Sun was required to obtain new certificate authority to sell additional gas from the Gwinville Field. The Commission's position, however, is that Section 7(b) of the Act somehow requires a continuation of deliveries of gas from that field to the same purchaser.

Section 7(b) provides:

> "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

By its very terms, Section 7(b) of the Act is clearly not applicable to the circumstances of this case. At the outset, it is plain that Sun has not sought or proposed to "abandon" anything. Sun's first sales contract simply expired by its own terms. There can be no abandonment of that which otherwise does not even exist; in such a situation there are no rights or obli-

gations which remain subject to abandonment. As already pointed out, when Sun's first sales contract expired by its own terms, Sun's certificate likewise came to an end. In these circumstances there was nothing which could conceivably be abandoned—the entire transaction simply came to a lawful end.

This is so because in its identification with "facilities" and "service," Section 7(b) of the Act certainly refers to nothing of any greater scope than the facilities, acts and operations which are required to be certificated under Section 7(c) of the Act. Since the primary exercise of affirmative jurisdictional authority is contained in the requirement of certification, Section 7(b), relating to abandonment, can not encompass more than Section 7(c), relating to certification. At the very most, and we say this only *arguendo*, the two sections relate to the same things, so that whatever must be certificated under Section 7(c) may not be abandoned without Commission approval under Section 7(b). And this statement, although it is over-stated in favor of Commission authority, is sufficient to speak our point. We have shown that with respect to Sun's first sales contract Sun applied under Section 7(c) only for a certificate to make and complete that particular and limited "sales," and that Sun was issued under Section 7(e) a certificate which authorized no more than that particular and limited "sale." Hence, when the sales contract expired by its own terms and the certificate authority likewise expired, the jurisdictional act and authority had come to an end and there was no continuing act or authority which could be abandoned and to which the provisions of Section 7(b) could conceivably apply. This conclusion is in keeping with

this Court's holding in the *CATCO* decision[25] that the "heart of the Act" is found in Sections 4, 7(c), and 7(e) (360 U.S. at 388). The Commission's attempt to apply Section 7(b) here is in direct contravention of that holding, for the effect of the Commission's position is to require the continued delivery of gas after the only certificated "sale" has expired. Thus, the Commission would unlawfully require a continued sale for which there is no certificate, even though the statute plainly provides that no sale shall be engaged in unless the natural-gas company holds a certificate with respect to the sale.

Section 7(b) is a complementary section to Sections 7(c) and 7(e). Section 7(b) may apply to certain facilities and acts which are certificated under Sections 7(c) and 7(e), during the effective period of the certificates, but it can never apply to any facilities or acts which are not subject to effective certificates. Sun's situation is in the latter category, since its certificate expired with the expiration of the sale made under its first sales contract.

This Court made clear in its *CATCO* decision that Section 7(b) can only be applicable where the acts involved are covered by an effective certificate. In that case, after setting forth that the Act prohibits any "* * * such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, * * *" the Court further pointed out that "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of *that supply*

[25] *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

from continued interstate movement without Commission approval" (360 U.S. at 389). In the context of the Court's statement, the gas which is dedicated to the interstate use through the certificate procedure is that which has been subjected to a contract commitment, and it is the gas subjected to the contract commitment which constitutes the "supply" which may not be withdrawn without Commission approval. No other supplies are subject to the inhibition against withdrawal. In Sun's case, even if it were assumed, *arguendo*, that the inhibition applies to a "sale," as distinguished from a "service," nevertheless the first sales contract, limited as to volume and term, constituted the only "supply" which could not be withdrawn, and upon completion of the contract and the delivery of the "supply" of gas committed thereunder, the inhibition of Section 7(b) of the Act no longer applied.

By applying Section 7(b) without regard to the effective certificate authority, the Commission is not in accord with the Congressional policy, as expressed in this Court's *Mobile*[26] and *Memphis*[27] decisions, that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such" (350 U.S. at 338; 358 U.S. at 110, and that Congress in drafting the Act manifested its concern for the legitimate interest of natural gas companies in whose financial stability the consuming public has a vital stake by "preserving the 'integrity' of private contractual arrangements for the supply of natural gas * * * (subject * * * to any

[26] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[27] *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103 (1958).

overriding authority of the Commission) * * *" (358 U.S. at 113-114). As pointed out above, the Commission did not purport to exercise any overriding authority and does not have regulatory authority to require Sun to continue to sell beyond the sale for which authority was sought or to produce additional volumes of gas.

By applying Section 7(b) without regard to the effective certificate authority the Commission is assuming authority not accorded it by the Congress over sales and transportation. Except for the authority accorded the Commission by Section 7(a) of the Act, the Commission is not authorized to initiate or require the sale or transportation of gas in interstate commerce.

The authority accorded the Commission by Section 7(a) relates to the extension and improvement of transportation facilities, to the establishment of physical connections with gas lines of local distributors, to sales to local distributors, and to the extension of lines to communities adjacent to lines. The authority in Section 7(a), however, is subject to the specific limitation that the Commission shall have no authority to compel the enlargement of transportation facilities for the above-enumerated purposes or to compel natural-gas companies to establish physical connection or sell gas when to do so would impair the ability of the natural gas company to render adequate service to its customers.

Section 7(a) is, of course, not applicable to sales by independent producers to pipeline companies. It does, however, suggest that the Commission's authority even within the specific limits of the section to initiate and require sales is to be strictly construed.

Cf. Panhandle Eastern Pipe Line Company v. *F.P.C.*, 204 F.2d 675 (CA-3 1953); *The Central West Utilities Company* v. *F.P.C.*, 247 F.2d 306 (CA-3 1957).

The Natural Gas Act, unlike Section 1(4) of the Interstate Commerce Act [28] and Section 201(a) of the Communication Act,[29] which requires common carriers to furnish service upon reasonable request therefor, does not subject natural gas companies to a duty to provide transportation or sell natural gas upon reasonable request therefor. The regulatory scheme under the Natural Gas Act requires the proponents of a sale or transportation to present it to the Commission for approval. After approval is obtained and the sale or transportation commences, the proponents become natural gas companies and must, to the extent Section 7(b) is applicable, continue the Act as authorized for the certificate term, unless authority to abandon pursuant to Section 7(b) is accorded by the Commission.

Moreover, in contrast to the limited power accorded the Commission under Section 7(a), Section 1(21) of the Interstate Commerce Act [30] and Section 214(d) of the Communications Act,[31] authorize the Commissions administering those Acts, after notice and opportunity for hearing, to require, with limitations, "common carriers" subject to those Acts to provide adequate facilities for the interstate service subject to those Acts. The differences in these Acts clearly reflect that Congress did not intend that natural gas

[28] 49 U.S.C. § 1(4).

[29] 47 U.S.C. § 201(a).

[30] 49 U.S.C. § 1(21).

[31] 47 U.S.C. § 214(d).

companies should have statutory service or sales obligations beyond their undertakings pursuant to Section 7(c) of the Act and did not intend that the Commission should be empowered to require service or sales in addition to specific undertakings proposed by the certificate procedure, except the limited authority in Section 7(a) already discussed.

As Congress obviously intended not to give the Commission jurisdiction to require sales by independent producers, Section 7(b) clearly does not indicate a Congressional policy that independent producers' certificates should be unlimited in term.

II.

THE FIRST SALES CONTRACT EXPIRED BY ITS OWN TERMS, BOTH AS A CONTRACT AND AS A RATE SCHEDULE, AND THE SALES CONTRACT OF AUGUST 1, 1957, COVERING A DIFFERENT VOLUME OF GAS, DID NOT CONSTITUTE A CHANGE IN RATE SCHEDULE

Sun's first contract, that of August 26, 1947, expired and terminated by its own terms at the expiration of the term stipulated in the contract. Sun's second contract, that of August 1, 1957, does not alter, amend, or continue in effect the first contract. It clearly represents a completely new, distinct, and separate sale of other and different gas.

In its order of September 12, 1957, the Commission recognized that the first sales contract had expired (R. 124). The Court of Appeals appears to agree that the first contract had terminated (R. 150). The two contracts are separate and distinct, and the second contract makes no reference to the first contract (R. 32-55, 61-86). The second contract was not to be effective until after the expiration of the first (R. 82).

What, then, was the status of the second contract, with respect to the initial rate filing provisions of the Natural Gas Act? Under Section 4(c) of the Act,

> "* * * every natural-gas company shall file with the Commission, * * * and shall keep open in convenient form and place for public inspection, *schedules showing all rates and charges for any* * * * *sale* subject to the jurisdiction of the Commission, * * * *together with all contracts* which in any manner affect or relate to such rates, charges, classifications, and services."

Within the meaning of those initial rate filing provisions Sun's second contract accomplished a sale of gas which is entirely separate and distinct from any other sale. Section 4(c) refers to and requires an initial rate schedule filing for "any sale." Moreover, in speaking of any sale "subject to the jurisdiction of the Commission," Section 4(c) incorporates by reference the various jurisdictional provisions of the Act, including Sections 1(b) and 7(c), which treat separately each sale of gas. Hence, Sun is entitled, and even required, by Section 4(c) to file its second contract as an initial rate schedule.

By the same token, Sun's second contract cannot lawfully be treated as a "change" in any existing rate schedule, nor may Sun lawfully be required to file the contract as a "change" in any rate schedule in order to make its terms effective. The first contract expired by its own terms. It no longer existed as the basis for any change. There was no relationship between the first and second contracts which could be made the basis for any assertion that the later contract was a "change" in the first contract.

When Sun filed and the Commission accepted Sun's first contract, that of August 26, 1947, as a rate schedule, the contract itself in *all* of its terms became Sun's rate schedule, including the provision for a fixed termination date. Section 4(e) of the Act is open to no other reasonable construction. Hence, when the term of the contract expired, the rate schedule consisting of the contract likewise expired, and there was then no rate schedule left in existence which could be the subject of a "change."

This analysis of the rate schedule provisions of the Act is, as it should be, entirely consistent with the corresponding certificate provisions of Sections 7(c) and 7(e) of the Act, which require a certificate for each separate "sale." We have shown that when Sun's first contract expired by its own terms, Sun's certificate for that sale likewise expired. By application of the same reasoning, when Sun's first contract expired, its rate schedule consisting of that contract likewise expired. And again, Sun's second contract, when filed, could only constitute a new and separate initial rate schedule entirely unto itself, and not a mere "change" in an expired rate schedule.

Section 4(d) of the Act, relating to the filing of changes in rate schedules, deals only with rate schedules which have been filed and accepted under Section 4(c) and which are still in force under Section 4(c). Thus, Section 4(d) provides that,

> "* * * no change shall be made by any natural-gas company in any *such* rate, charge, classification, or service, or in any rule, regulations, or *contract* relating thereto, except after thirty days' notice to the Commission and to the public. * * *"

It is apparent that the provision for such notice relates only to a change in a rate or in a contract containing a rate which is otherwise still in force and effect under Section 4(e). If the rate or the contract has expired by its own self-contained terms which were filed and accepted as part of the rate schedule in accordance with Section 4(e), there is then nothing left which can be the subject of a notice of change under Section 4(d). The further language of Section 4(d) confirms this result by providing the procedure for giving the notice of a change in a rate schedule "then in force."

At the effective date of Sun's second contract, which occurred after the termination of the earlier rate schedule, there was no other contract or rate schedule "then in force" as to which the second contract could be considered a "change." The first contract had expired and the rate schedule consisting of that contract had likewise expired by its own terms. In such a situation the second contract could not conceivably be treated as a change in the first within the meaning of the rate provisions of the Act.

If the language of the Act itself is not enough in this connection, this Court made clear the proper application of the provisions of Section 4, in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956), when it said, "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such." The Court proceeded to explain that the basic scheme of the Natural Gas Act is to permit rates to be determined in the first instance by the natural-gas companies, by contract or otherwise. The initial rate-setting powers are thus with the natural-gas com-

panies, and the Commission has neither a rate-making nor a rate-changing power, but only the power to review rates and contracts made in the first instance by the natural-gas companies.

Under this Court's analysis of the Act in *Mobile*, Sun's contract of August 1, 1957, constituted an exercise by Sun of its initial rate-setting power, and the Commission is without authority to treat the contract as a "change" within the meaning of Section 4 of the Act. The Commission has no power to summarily delay the effectiveness of the second contract beyond the effective date provided in the contract, simply because such a delayed effectiveness is not contemplated by the contract—yet that is precisely what the Commission purported to do by its orders. By the same token, the Commission is without power to summarily extend the term specifically set out in the earlier contract, simply because the extended term is not contemplated by that contract—yet that is precisely what the Commission purported to do by its orders. Each contract represented an exercise by Sun of its lawful initial rate-setting power under the provisions of the Natural Gas Act, as construed by this Court in *Mobile*.

In the light of this Court's decision in *Mobile*, there can be no question that the suspension power set out in Section 4(e) of the Act is not available to the Commission under the circumstances of this case. Whether a "change" has occurred in a rate schedule is to be determined in the first instance (subject to the rate review powers of the Commission) in accordance with the contracts made by the parties themselves, not by the Commission. Here no "change" in the first contract was agreed to by the parties: they made no

amendment or supplement or modification of that contract; it simply expired by its own terms. Section 4(e) of the Act is plainly inapplicable.

A majority of the Court of Appeals, after citing that Court's earlier decisions in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (CA5-1947), *cert.* denied, 332 U.S. 770, and *Bel Oil Corporation* v. *Federal Power Commission*, 255 F.2d 548 (CA5-1958), *cert.* denied, 358 U.S. 804, concluded as follows:

> "* * * It necessarily follows that where, upon the termination of a contract fixing a rate which was the subject of an initial rate filing with the Commission, a new contract is made between the same parties for the same service as was provided by the terminated contract but at a higher rate, the new rate is a rate change and subject to the provisions of Section 4 of the Act, including the provisions relating to the suspension of the rate * * *." (R. 150)

It is respectfully submitted that the Court below, speaking through the majority, erred in the foregoing statement, and that such a conclusion as that reached by the Court does not follow, necessarily or otherwise, from the authorities cited or from any other authorities.

Neither the *Mississippi Power & Light Company* case nor the *Bel Oil Corporation* case is applicable here, and both are clearly distinguishable from Sun's case. Both cases clearly involved changes in otherwise existing, presently effective contracts and rate schedules. In the *Mississippi* case the change appears to have been made in a presently effective contract filed as a rate schedule. In the *Bel* case the change was

made wholly within the effective term of a producer's gas sales contract.

We have shown that Section 4(d) of the Act, by its most liberal interpretation, applies only to changes in presently effective rate schedules which would continue in effect except for the change. Both the *Mississippi* and *Bel* decisions are consistent with such an interpretation, and consistent with *Mobile*, in that they dealt solely with changes in rate schedules which would otherwise continue in effect, except for the change. But it does not follow, nor can it follow, from either the Act or the *Mississippi* and *Bel* cases that a complete, new and unrelated gas sales contract, such as Sun's second contract, constitutes a "change" in an expired contract, one which is no longer effective either as a contract or as a rate schedule. Obviously, something which does not exist can not be changed. Sun's first contract was completely performed, without any change, and neither the buyer nor the seller had even sought to change or amend it in any respect. Under such circumstances, Sun's second contract could only be treated as an initial rate schedule under the terms of Section 4(e) of the Act.

The majority of the Court below was likewise in error, it is submitted, in characterizing Sun's second contract as being "for the same service" as was provided by the first contract which had expired (R. 150). We have shown that neither of the contracts represented a "service," but that each in fact constituted an entirely distinct, separate and unrelated "sale" of a commodity, gas, in a specific volume and for a specific term. In denominating both contracts as covering the "same service," the Court below has not inquired into, but has rather *assumed* the answer to the

principal issue in this case, without support in the Act or in the cases. Neither the *Mississippi* nor the *Bel* case, in dealing with existing, presently effective rate schedules and contracts, is authority for the proposition that some form of new life can be breathed into a terminated sales contract so as to make of it a perpetual and universal "service" agreement. Moreover, there is nothing in the record here to indicate that either contract constituted a "service," and much less did the contracts constitute the "same" service. It is clear from the record that the contracts were entirely different and distinct in all major respects, and related to entirely different "sales" of entirely different volumes of gas. In effect, the majority of the Court below has ignored the contracts, and has substituted a vague universal "service" concept not contemplated by the Act.

We believe that the basic error involved in the Court's determination is aptly phrased by Judge Brown, in his dissenting opinion:

> "Except for the imprimatur of this Court which states that it is *law*, I do not at all think it follows, either normally or naturally or *necessarily*, that 'upon the *termination* of a contract' a '*new* contract between the same parties' is a rate change. To reason from *existing* contracts to entirely *new* ones after termination is a non sequitur flying in the face of *Mobile*." [*United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956)] (R. 156)
>
> * * * * * * *
>
> "The Supreme Court [in *Mobile*] makes two things clear. First, private contracts underlie the whole scheme of regulation. Second, such private contracts give way only by determination of the Commission made after notice, hearing and

> order. This basic approach pervades all said and done in *Mobile*. * * *" (R. 160) (Emphasis not added)

In the light of *Mobile*, this view by Judge Brown of the result reached by the conclusion of the majority of the Court below is likewise pertinent:

> "* * * I would be the first to think that we could legislate interstitially, but that hardly includes ingraftment or transplanting of a congentially missing organ. If the supposed adverse results apprehended would occur, which I doubt, then Congress, not this Court, should be the surgeon." (R. 156)

The "congenitally missing organ" is the gap between the "sale," represented by the contract, on the one hand, and the perpetual dedication to a "service," as found by the Court to exist, on the other hand. That is the gap which the majority of the Court below so quickly bridges by holding that the latter "necessarily follows" from the former. But the gap cannot, and should not, be bridged because this Court has clearly said in *Mobile* that Congress, with deliberate intent and purpose, installed the gap and meant that it should be preserved. If the gap is no longer proper, to which we do not agree, it is for Congress, and not the Courts, to make the bridge. Meanwhile, the terms of the private contracts determine (subject to the supervision and review powers of the Commission) the extent and term of both the certificates and the rate schedules. In this light, Sun's second contract could only be an initial rate schedule, not a "change" in a terminated rate schedule. And in this light, a contract canont be accorded integrity,[32] as this Court

---

[32] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

has said it must, and still be construed as requiring the sale (but not the purchase) of other and different volumes of gas, as the Court below appears to have proclaimed.

III.

THE COMMISSION'S DECISION DOES NOT PROMOTE THE PURPOSE OF THE NATURAL GAS ACT, IS CONTRARY TO THE REGULATORY SCHEME OF THE ACT, AND IS NOT IN THE PUBLIC INTEREST

In this proceeding, the Commission has held, in effect, that the thousands upon thousands of gas producers in the United States have no right to sell batches of gas into interstate commerce under effective sales contracts with any degree of integrity or stability. The Commission has here held, in effect, that the provisions of a gas sales contract between a producer and a buyer, which relate to both quantity and delivery term, have no meaning or sanctity whatsoever. The Commission has here held, in effect, that when a producer sells a batch of gas by a gas sales contract, he automatically becomes obligated to sell, not only that batch of gas, but that thereafter he must keep on delivering additional and further batches of gas, presumably of the same quality, in complete disregard of the fact that no contract therefor exists, in complete disregard of the fact that he may not even own any more gas and may never even be able to find any more, or even be able to produce it under state regulation. And this, even though the buyer is apparently no longer bound, after the contract is fulfilled and terminated, to either take or pay for the gas which the Commission insists that the seller is, without contract, obligated to deliver.

It is to be noted that Southern Natural Gas Company, the buyer in Sun's gas sales contract of August

26, 1947, is not a party to this case, and did not attempt to intervene. Presumably it is satisfied with the contract and agreeable to its sanctity and integrity. In *Mobile*,[33] the buyer in the case was insisting upon the integrity of its contract which the seller was trying to avoid. In *Mobile*, the Commission was on the side of the seller, who sought to avoid the contract, and insisted that the contract had no integrity.

Here, the Commission stands alone. Here, the seller is insisting upon the integrity of its contract, and the absent buyer is presumably willing to live up to its contract. It is only the Commission which is not satisfied with the integrity of the contract.

This situation presents many practical questions to the thousands upon thousands of gas producers and explorers in the country today, and undoubtedly also presents many problems to pipelines, distributors, and consumers. Why enter into a contract if it has no sanctity or integrity? Why should the seller obligate himself if the buyer is not likewise obligated? If the contract has no integrity, then how can either the buyer or the seller safely plan his business future? These are only a few of the many practical questions facing the gas industry today in the light of the Commission's contentions here.

In *Mobile*,[34] this Court said that,

> "* * * By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * *" (350 U.S. at 344)

---

[33] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[34] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

So, why should the Commission here continue to insist that contracts have no integrity or stability, in a case where both buyer and seller are apparently both willing to live up to their contract one hundred percent, and apparently both willing that the contract have integrity and sanctity?

Apparently, Judge Brown, in his dissent below, answered that question, as follows:

> "Both expresed in the briefs of the Commission, and unexpressed but implicit in the Court's opinion, is the apprehension that administrative regulation would be thwarted if parties can prescribe the term (i.e. quantity) of the contract. Assuming that this is for us, rather than the Congress, there are at least three answers. First, we are not here dealing with purported contracts of short and artificial duration. All of the contracts were for the substantial term of 10 years. History has proved that they were genuine and were applied in good faith. Second, the new contracts are likewise of substantial duration. Even more so, because their terms are 20 years. This means that the 'new' contracts are substantially different. They are not, as claimed, for the same service but only at a different price. One committing himself for two decades instead of 10 years not only to make the sales but to automatically submit himself to extensive Commission regulation during that period has done much more than simply renew a prior engagement. Third, there are now sufficient administrative tools to prevent any abuse of the accepted purpose of the Act through the spurious device of artificial short contract terms, or any other means by which parties attempt to create the appearance of a firm contract, but which is in fact but a paper transaction." (R. 161-162)

What "administrative regulation [by the Commission] would be thwarted" if the parties to contracts can prescribe their terms and provisions?

In the preceding sections we have shown that the Commission's contention and decision is not in accord with the regulatory scheme of the Act. It has also been shown that the Commission is attempting to exceed its jurisdiction under Section 1(b) of the Act by requiring production of natural gas.

In the preceding sections we have also shown that the action of the Commission is directly contrary to the fact that the Act evinces no purpose to abrogate private contracts.[35] The effect of the Commission's action has been so far-reaching in denial of Sun's contract and property rights as to amount to a deprivation of property without due process, in violation of the Fifth Amendment to the Constitution of the United States.

We now show that the action of the Commission is not in the public interest and does not promote the primary aim of the Act—"to protect consumers against exploitation at the hands of natural gas companies".[36]

Mr. Justice Jackson, in the *Hope* case,[37] set forth in detail the development of the natural gas industry and many of the complexities involved in the production and sale of natural gas. The billions upon billions of dollars invested in the natural gas industry demonstrates the importance of natural gas to the social, economic, and general welfare of the United States.

---

[35] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1956).

[36] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[37] *Ibid.*, at 628.

It is a matter of common knowledge that the relationships between all of the several branches of the natural gas industry have developed throughout the years under private contractual arrangements, subject, of course, to the overriding authority of the Commission which it clearly did not validly exercise in this proceeding.

This case affects not only the thousands upon thousands of both large and small gas producers in the United States, as well as the thousands who venture capital but have not yet discovered marketable reserves, but also all segments of the industry and the consuming public at large. For scores of years thousands of gas producers have been selling batches of gas, large and small, into the market place, under a multitude of circumstances and conditions, and under gas sales contracts of many different types. Every year hundreds go out of business because wells die and the explorer can find no more gas. Every year hundreds of new ones enter the business, selling a batch of gas here and there, if they can find both the gas and a market for it. The industry has grown up and developed through the years with the firm belief among prospectors, explorers, producers, pipe line purchasers, distributors, and consumers alike, that contracts among and between them have integrity and sanctity.

Prospectors and explorers for new underground gas reserves have risked their capital, with heavy odds against their finding any new reserves, with the assumption that, if they did find a new batch of gas, and if they could find a market for it, they could sell it or parts of it into the market place under contracts which have integrity and sanctity. Some found new reserves. Many failed.

In *Memphis*,[38] this Court pointed out that Congress, in drafting the Natural Gas Act, "* * * was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas consuming public has a vital stake * * *." Also this Court there pointed out that Congress had this concern in mind in "* * * preserving the 'integrity' of private contractual arrangements for the supply of natural gas * * *," subject of course to any overriding authority of the Commission. (358 U.S. at 113-114.)

Without such "'integrity' of private contractual arrangements", there can be no stability in which the gas consuming public has that vital stake. Without such "'integrity' of private contractual arrangements", neither any branch of the industry nor consumers can appraise the future with any reasonable degree of accuracy or dependability.

Aside from the matter of stability of contracts, explorers and producers are already in the most unstable position of any segment of the industry. Neither the Commission nor anyone else can ever guarantee that he will not lose every dollar of his investment when he explores. No one can guarantee that, if he finds gas, it will be in merchantable quantities. No one can guarantee that, if he finds merchantable gas, he can find any market for it. No one can ever guarantee that, even though he finds a market for it, he can ever recoup his investments. The producer gambles under those and many other unstable hazardous conditions which do not obtain in other branches of the industry. It is not in the public interest to now take

---

[38] *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

away the integrity of contracts and thus add an additional hazard and element of instability to his gambles.

So, it is respectfully submitted that the Commission's apparent "apprehension that its administrative regulation would be thwarted," if parties can prescribe the terms and conditions of the contract, is entirely an unjustified apprehension, it is not in accord with the regulatory scheme of the Act, it is directly contrary to the purpose of the Act, it is not in the public interest, and does not promote the primary aim of the Act (R. 161).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

MARTIN A. ROW
EDWIN M. CAGE
P. O. Box 2880
Dallas 21, Texas

LEO J. HOFFMAN
Turner, White, Atwood,
McLane and Francis
1900 Mercantile Dallas Building
Dallas 1, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

By OMAR L. CROOK

Certificate of Service

I certify that the foregoing Brief of Petitioner, Sun Oil Company, was served upon the Federal Power Commission by mailing a copy thereof, postage prepaid, to each of the following attorneys for the Federal Power Commission on this 13th day of February, 1960:

J. Lee Rankin, Solicitor General
Department of Justice
Washington 25, D. C.

Willard W. Gatchell, General Counsel
Howard E. Wahrenbrock, Solicitor
William W. Ross, Attorney
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

OMAR L. CROOK,
Attorney for Petitioner,
Sun Oil Company.

APPENDIX

Excerpts from the Constitution of the United States

Amendment V—Capital Crimes: Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U. S. Code Annotated, Constitution, Amendments 1 to 13, P. 102).

Excerpts from the Natural Gas Act

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES; SECTION 1.

. . . . . .

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (b)]

. . . . . .

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4.

. . . . . .

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such

schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c].

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to com-

munities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U. S. C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commis-

[1] Subsection 7(c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

sion, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission, and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)][2]

. . . . . .

[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or

any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served; it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] Subsection 7(e) was added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

* * * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19.

* * * * * * * * * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[8] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

[8] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole ~~or in part,~~ any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * * * * * * *

Excerpts from Rules of Practice and Procedure of the Federal Power Commission

1.30 DECISIONS

* * *

(c) *Waiver and omission of intermediate decision procedure.* (1) In lieu of any intermediate decision (initial by presiding officer, recommended by presiding officer or designated responsible officer, or tentative by the Commission), any party or staff counsel in any proceeding may request that the Commission forthwith render the final decision; and if all other parties and staff counsel

join or concur in such request, it shall be deemed to have been granted unless the Commission denies such request within 10 days next following its submission or filing. In such requests for omitting the intermediate decision procedure there shall be specified:

(i) The concurrence of the other parties and staff counsel;

(ii) Whether opportunity for presenting oral argument or filing briefs before the presiding officer or Commission is desired or waived;

(iii) Whether opportunity for presenting proposed findings and conclusions with supporting reasons therefor, is desired or waived; and

(iv) Whether the parties reserve only their rights to apply to the Commission for rehearing and to petition for judicial review of the Commission's decision or order as may be provided for by the statute under which the proceeding was initiated and conducted.

[Subparagraph (1) amended by Order 175, F. R. 5213, Aug. 18, 1954]

(2) In rule-making or initial licensing proceedings the Commission with or without request or motion therefor, may render the decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(3) Requests for waiver and omission of the intermediate decision procedure shall be by motion filed with the Commission at any time during, but not later than five days next following, the conclusion or adjournment sine die of the hearing; shall be in writing under oath, subscribed and verified; and shall in all other respects conform to the requirements of §§ 1.12 and 1.15 to 1.17, inclusive: *Provided, however,* That during sessions of hearings in proceedings, motions for such waiver and omis-

sion may be made orally on the record before the presiding officer, who shall forthwith report the same to the Commission.

* * * * * * * * * * *

1.32 SHORTENED PROCEDURES

* * *

(b) *Noncontested proceedings.* In any proceeding required by statute to be set for hearing, the Commission when it appears to be in the public interest and to the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consideration of the pleadings and other evidence filed and incorporated in the record: *Provided*, (1) the applicant or initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (2) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the Federal Register of the notice of the filing of an initial pleading and notice or order fixing date of hearing, which notice or order shall state that the Commission considers the proceeding a proper one for disposition under the provisions of this section, and shall otherwise conform with the requirements of § 1.19. Requests for the procedure provided by this section may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after noncontested hearing, will be final, subject to reconsideration by the Commission upon application for rehearing as provided by statute.

* * * * * * * * * * *

Excerpts from Order No. 174-A of the Federal Power Commission

The Commission, acting pursuant to the authority granted by the Natural Gas Act, particularly Sections 4, 5 and 16 thereof (52 Stat. 822, 824, 830; 15 U.S.C. 717c, 717f and 717o), and subject to the provisions of Sections 3 and 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002, 1003), *orders:*

(A) Part 154—Rate Schedules and Tariffs—of Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 154.91 *"Independent Producer" Defined.*—An "independent producer" as that term is used in these Rules means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

• • •

(B) Part 157—Applications for Certificates of Public Convenience and Necessity under Section 7 of the Natural Gas Act, as amended, Subchapter E, Regulations under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended by adding thereto new sections reading as follows:

§ 157.23 *Applications for Certificate of Public Convenience and Necessity by Independent Producer*—(a) Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, shall, on or before October 1, 1954, file with the Commission an application (original and 14 copies) in accordance with Sections 157.24 through 157.27.

• • •

§ 157.24 *Contents of application.* (a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

• • •

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas com-

pany. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit B of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

* * * * * * * * * *

[redacted]

ILE COPY

Office-Supreme Court, U.S.
FILED
MAR 28 1960
JAMES R. BROWNING, Clerk

No. 321

In the Supreme Court of the United States

October Term, 1959

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

J. LEE RANKIN,
Solicitor General,
GEORGE CHEEKAM DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
Attorney,
Department of Justice, Washington 25, D.C.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
PETER H. SCHIFF,
Attorney,
Federal Power Commission, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	6
Argument	13
I. The higher rate in petitioner's new (1957) contract provided for a change in an existing rate for the same service and was therefore required to be filed under Section 4(d) of the Natural Gas Act	13
A. The Commission regulation, under Section 4 (d) and (e), of gas producers' rates is not limited by the duration of the contracts under which they supply their gas to interstate pipelines, but is based upon the fact that a continuing service is provided	15
B. Sales under the new contract constituted a continuation of the service rendered under the 1947 contract so that the increased rate was a changed rate subject to filing under Section 4(d) of the Act	21
C. Under Section 4 of the Act and the Commission's regulations, a rate schedule can be terminated only after a notice of change is filed pursuant to Section 4(d)	25
D. This Court's decisions do not immunize rate increases embodied in "new" contracts from Commission review under Section 4(d)	33
II. Petitioner's application for a new certificate authorizing the sales covered by its 1957 contract was properly rejected since the authorization requested existed under the previously issued and existing certificate	40
Conclusion	50
Appendix	51

CITATIONS

Cases:

	Page
Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378	10, 14, 37, 38
Bel Oil Corp. v. *Federal Power Commission*, 255 F. 2d 548, certiorati denied, 358 U.S. 804	30
Cities Service Gas Producing Co. v. *Federal Power Commission*, 233 F. 2d 726, certiorari denied, 352 U.S. 911	31
Episcopal Theological Seminary v. *Federal Power Commission*, 269 F. 2d 228, certiorari denied *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895	31
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591	37
Federal Power Commission v. *Sierra Pacific Power Co.*, 350 U.S. 348	39
Gulf Oil Corp. v. *Federal Power Commission*, 255 F. 2d 556	30
Humble Oil and Refining Co. v. *Federal Power Commission*, 236 F. 2d 819, certiorari denied, 352 U.S. 967	5
Louisiana-Nevada Transit Co., 2 F.P.C. 546	47
Mississippi Power & Light Co. v. *Memphis Natural Gas Co.*, 162 F. 2d 388, certiorari denied, 332 U.S. 770	30
Mississippi River Fuel Corp. v. *Federal Power Commission*, 121 F. 2d 159	30
Panhandle Eastern Pipe Line Company, 4 F.P.C. 1081	45
Panhandle Eastern Pipe Line Co., 11 F.P.C. 167, vacated for reconsideration on other grounds, *sub nom. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 925	45
Pennsylvania Water & Power Co. v. *Federal Power Commission*, 343 U.S. 414	29, 31, 32
Phebus, Ray, 2 F.P.C. 1044	46
Phebus Pipe Line Co., 9 F.P.C. 384	46
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	3, 18, 30, 31
Southern Natural Gas Co., 8 F.P.C. 688	47
Sun Oil Co. v. *Federal Power Commission*, 255 F. 2d 557, certiorari denied, 358 U.S. 804	30
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 239 F. 2d 97, reversed and remanded, 353 U.S. 944	45

Cases—Continued

	Page
Sunray Mid-Continent Oil Company v. *Federal Power Commission*, Supreme Court No. 335, this Term	7, 12, 17, 21, 47, 48
Sunray Oil Corporation, 14 F.P.C. 877	45
Texas Gas-Transmission Corp., 9 F.P.C. 1062	47
United Gas Pipe Line Company, 3 F.P.C. 3	46
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103	10, 11, 27, 35, 36, 39, 40
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332	9, 10, 33, 34, 35, 36, 37, 38, 39
Statutes, Rules and Regulations:	
Federal Power Act, Section 205, 16 U.S.C. 824	27, 31
Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717–717w:	
Section 1	51
Section 1(a)	51
Section 1(b)	16, 17, 48, 51
Section 1(c)	17, 51
Section 4	6, 7, 10, 15, 27, 31, 35, 36, 52
Section 4(c)	13, 15, 20, 24, 26, 52
Section 4(d)	6, 7, 8, 9, 13, 15, 21, 23, 24, 25, 26, 30, 31, 33, 34, 36, 37, 39, 40, 52
Section 4(e)	4, 7, 14, 15, 24, 25, 33, 34, 37, 38, 52
Section 5	7, 10, 15, 33, 54
Section 5(a)	10, 14, 38, 39
Section 7(b)	4, 17, 46, 47, 54
Section 7(c)	17, 18, 43, 55
Section 7(e)	18, 43, 56
Section 7(g)	17, 57
Section 19(b)	49, 57
Federal Power Commission Order No. 50, Section 35.1, 18 C.F.R. (1939) 35.1	27
Federal Power Commission Order No. 52, Section 54.13, 3 F.R. 1681	29
Federal Power Commission Order No. 59, 4 F.R. 1185	29
Federal Power Commission Order No. 141, Section 154.1, 12 F.R. 8461	27
Federal Power Commission Order No. 144, 13 F.R. 6371, 6838	27

Statutes, Rules and Regulations—Continued

Federal Power Commission's Rules and Regulations, 18 C.F.R. (1958 Supp.):

	Page
Section 1.1	2
Section 2.4 (1949)	28, 58
Section 2.32 (1949)	28, 59
Section 35.1 (1949)	27, 28
Sections 154.1–154.86	27
Section 154.91	3, 59
Section 154.91(a)	59
Section 154.92	59
Section 154.92(a)	59
Section 154.93	26, 60
Section 154.94	13, 60
Section 154.94(a)	28, 60
Section 154.94(b) (as amended by Order 202, 23 F. R. 3715, May 29, 1958)	28, 61
Section 154.94(c)	28, 61
Section 154.94(d)	61
Section 154.94(e)	61
Section 154.94(f)	62
Section 154.94(g)	62
Section 154.95 (as amended by Order 202, 23 F. R. 3716, May 29, 1958)	62
Section 154.96	63
Section 154.97	4, 28, 63

Miscellaneous:

Uniform Sales Act, § 1	19
1 Williston on Sales, § 1	19

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 146–164) are reported at 266 F. 2d 222. The letter order of the Federal Power Commission, dated September 12, 1957 (R. 123–124), is not reported. The Commission's orders, issued November 8, 1957 (R. 133–135, 136–138), are reported at 18 F.P.C. 609, 611. The letter order of December 10, 1957 (R. 145), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (R. 164). A petition for rehearing, timely filed, was denied on June 3, 1959

(R. 165). The petition for a writ of certiorari was filed on August 18, 1959, and granted on November 9, 1959 (R. 165), 361 U.S. 880. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTIONS PRESENTED

1. Whether the rate established by a new contract, pursuant to which a producer of natural gas agrees, after expiration of a pre-existing contract, to continue selling gas to a pipeline, from the same gas reserves from which it had supplied the pipeline at a lower rate under the expiring contract, constitutes a "change" in rate which can become effective only in accordance with the procedures of Section 4(d) of the Natural Gas Act.

2. Whether, in the circumstances of this case, the Commission was correct in construing the certificate of public convenience and necessity previously issued to petitioner as an authorization of unlimited duration to make sales of gas to the pipeline from the described reserves.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717–717w, and of the Commission's regulations, 18 C.F.R. 1.1, *et seq.*, are set out in the Appendix, *infra*, pp. 51–63.

STATEMENT

Petitioner Sun Oil Company, an independent producer of natural gas, sells gas from certain leases in the Gwinville Field in Mississippi to Southern Natural Gas Company, the exact amounts depending on the

latter's needs in the operation of its interstate pipeline. The sales were commenced under a contract entered into in August 1947 for a term of ten years from the date of first delivery (R. 32).

In anticipation of the contract's expiration on September 3, 1957, Sun negotiated a new agreement with Southern, dated August 1, 1957, for continued sales by Sun from the same field (R. 81–85). This new agreement was to be effective upon the expiration of the existing contract (R. 82). The new agreement contained terms and conditions similar to those in the existing contract and on its face provided for the sale of gas to Southern from the identical acreage and wells, by means of the same facilities, as in the existing contract (R. 32–33, 62–63). The new contract, however, contained a rate of 20 cents per Mcf instead of the rate of 7.36 cents per Mcf under the old contract (R. 46, 77, 134).[1]

After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the promulgation by the Federal Power Commission of its No. 174 series of orders implementing that decision (18 C.F.R. (1958 Supp.) 154.91 *et seq.*), petitioner on November 30, 1954, sought a disclaimer of Commission jurisdiction or, in the alternative, a certificate of public con-

[1] Under the 1957 contract, which provided for a base rate of 20 cents per Mcf, the volumes of gas were to be calculated at a pressure base of 15.025 per square inch absolute (R. 73). By contrast, the volumes of gas under the 1947 contract were calculated at a pressure base of 16.7 pounds per square inch absolute (R. 45). In 1957, the rate actually in effect under the 1947 contract was 8.18 cents per Mcf, measured at the 16.7 p.s.i.a. pressure base (R. 60). This included tax reimbursement. This rate when converted to the pressure base of 15.025 p.s.i.a is 7.36 cents per Mcf.

venience and necessity authorizing the continuance of its sales to Southern then being made under the 1947 contract (R. 26). On the same date, the 1947 contract was filed as Sun's F.P.C. Gas Rate Schedule No. 55 (R. 32). On May 28, 1956, the Commission issued its certificate authorizing the continuation of the sales to Southern described by the 1947 contract, as well as the facilities employed in making such sales (R. 99–112).

Before the expiration of the existing 1947 contract, Sun sought to obtain certification for the allegedly new and distinct service to Southern under the 1957 contract (R. 115). At the same time, it tendered the new contract for filing as an "initial" rate schedule (R. 113). However, Sun neither applied for approval of abandonment of the sales under the 1947 agreement, pursuant to Section 7(b) of the Natural Gas Act (App., *infra*, pp. 54–55), nor gave notice of the termination or cancellation of its Rate Schedule No. 55, pursuant to Section 4(e) of the Natural Gas Act or Section 154.97 of the Commission's Natural Gas Act Regulations (App., *infra*, pp. 52–54, 63).

By letter-order dated September 12, 1957, the Commission rejected the application for a new certificate and the proffered initial rate filing (R. 123). The certificate application was rejected because it covered the precise acreage from which sales by Sun to Southern had been authorized on May 28, 1956, by the certificate which was still valid and outstanding (R. 123–124, 28). The 1957 contract was not accepted as an initial rate filing because "such proposed rate schedule duplicates sales from units covered by your existing FPC Gas Rate Schedule No. 55 and such proposed rate schedule embodies a change in the

effective rate for gas sales from such units" (R. 124). Sun was advised, however, that this rejection was without prejudice to the re-tender of the proposed rate, accompanied by the material required to be submitted in support of changed rates (R. 124).

Thereafter, petitioner applied for rehearing and at the same time filed its new contract, under protest, as a rate change (R. 87, 124). Reiterating its previous explanation, the Commission denied reconsideration on November 8, 1957 (R. 133). Concurrently, the proposed rate change was suspended and a hearing was set to determine the lawfulness of the increased rate (R. 136). Sun's application for rehearing of the suspension and hearing order was rejected as not addressed to a final order (R. 145).[2]

The court below, with Judge Brown dissenting, affirmed the Commission's orders in all respects. It held that where a new contract is made between the same parties for the same service as provided by the terminated contract, but at a higher rate, the new rate

[2] As noted in our brief in opposition (p. 3, fn), the Commission believes that a party is not entitled to immediate review of the order of the Commission setting for hearing and suspending the rate schedules filed as changes because such an order is procedural and interlocutory, see, *e.g.*, *Humble Oil and Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5), certiorari denied, 352 U.S. 967. Sun seeks review here of the November 8 hearing-and-suspension order as well as the September 12 letter-order rejecting its certificate application and rate schedule as an initial rate. Review of both orders involves the same questions. Since we do not challenge the reviewability of the letter-order of rejection, the issue relating to the reviewability of the hearing-and-suspension order is academic.

544174—60——2

is a rate change, not an initial rate, and hence subject to the suspension provision of Section 4 of the Natural Gas Act. The court also held that there was nothing to petitioner's contentions that, with respect to the 1947 contract, it had sought a certificate of limited duration or that the Commission intended to so limit the certificate issued on May 28, 1956 (R. 149–153).

SUMMARY OF ARGUMENT

I

Prior to the expiration in 1957 of the gas-sales contract pursuant to which petitioner Sun had been selling natural gas to Southern from certain reserves since 1947, Sun and Southern entered into a new contract which provided for the continuation of such sales for another twenty years, but at a higher rate. When Sun tendered the new contract to the Commission for filing as an initial rate, the Commission rejected the proffered filing because the higher rate constituted a changed rate which should have been filed in accordance with the provisions of Section 4(d) of the Natural Gas Act and the regulations relating to changed rates. It is only with respect to changed rates that the burden is on the seller to show that they are just and reasonable and that the Commission can order a refund of any portion found after hearing to have been unjustified. In our view, the Commission correctly ruled that the new rate was a changed rate required to be filed subject to suspension, rather than as an unsuspendible initial rate.

A. Petitioner's contrary argument is based on the erroneous premise that the Commission must regulate

each contract under which Sun serves Southern as a single unique event taken by itself, rather than regulating the continuing service or sales actually made pursuant to the contract. Under Section 4 and 5, the rate review provisions of Act, the Commission must determine the justness and reasonableness of rates for jurisdictional gas sales and transportation, and its regulation of particular contracts is incidental to that purpose. The statute manifests the Congressional understanding that, by making sales or transporting gas, natural gas companies render continuing services; and the provisions of Section 4 (d) and (e) are to be applicable to the continued selling or transporting of gas whether those services are rendered pursuant to contract or otherwise. See also the Commission's brief in *Sunray Mid-Continent Oil Company*, No. 335.

Sun's 1947 contract with Southern illustrates that sales of natural gas by producers are a continuing service, subject to Commission supervision. That contract, rather than constituting simply a sale of a "specific volume" or "batch" of gas, as petitioner would have it, plainly described a supply service, defining the seller's obligations and the buyer's rights in terms showing the importance of the readiness to serve or deliver gas on both a daily and an annual basis. In addition, the 1947 contract was not even a completed sale but only an agreement to enter upon a service. The agreement did not transfer or purport to transfer title to any of Sun's gas prior to delivery to Southern. Indeed, the quantity ultimately to be delivered could not be determined at the inception of

the contract since it was dependent on the needs of the buyer as they might vary from time to time.

B. The court below was plainly correct in affirming the Commission's determination that the service to be rendered under the new contract was a continuation of the service which Sun had rendered to Southern for ten years. Sun has conceded that, if its sales are a service, the service under the new contract is a continuation of that under the old. It is apparent from the face of the two contracts that the source of the gas sold on the expiration of the old agreement was identical with that sold under the new at its commencement; that the buyer and the seller are the same; and that both contracts provided for the same delivery facilities. In these circumstances, the higher rate of the new contract was a *change* in the rate being charged by Sun for an existing service. Hence, Sun was required to comply with the provisions of Section 4(d) of the Act, which prohibit a change in any jurisdictional rate unless a notice of change is given to the Commission and the public by the filing of a new schedule showing the changed rate.

C. Petitioner is also incorrect in its contention that its rate schedule, consisting of the 1947 contract and a supplement, automatically ceased to exist as a rate schedule when the private obligations of that contract terminated. For the purposes of the Gas Act, all provisions of a contract filed as a rate schedule are not self-operative, without regard to the notice-of-change provisions of Section 4(d). On the contrary, only those provisions of the contract which define the service and the price initially to be paid are the "rate"

in effect, within Section 4(e), while the other provisions of the contract filed as a rate schedule (such as those calling for automatic changes in price by escalation or favored-nation provisions, or for termination of service) are not. And while a contract may expire of its own terms as a contract, its existence as a rate schedule can be terminated only by compliance with the provision of Section 4(d). Here, Sun's 1947 contract, filed as its Rate Schedule No. 55, necessarily remained in effect on September 3, 1957, the date on which service was to continue under the new contract, since Sun had neither filed a notice of termination with respect to that rate schedule nor a new schedule to take its place in accordance with Section 4(d). The Commission's regulations make this clear, and the courts of appeals have consistently agreed with the Commission that, under the Natural Gas Act and its regulations, future rate changes contemplated by contracts filed as rate schedules can become operative only after statutory notice is given. By the same token, future service changes, such as a termination, are not self-operative. Accordingly, there is no merit to Sun's claim that its Rate Schedule No. 55 expired of its own force on the date of expiration of the 1947 contract, without any notice of termination or of change having been filed.

D. Sun incorrectly contends that the decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, in which this Court held that the Act did not permit a party to a rate contract *unilaterally* to abrogate that contract, compels the con-

clusion that its new contract rate was immune from Commission action except under Section 5 of the Act, and was therefore a non-suspendible initial rate. The claim is that, under *Mobile*, suspension of the changed rate is barred because suspension will delay the effectiveness of the new rate agreed to by the parties and also extend the effectiveness of the existing rate beyond the agreed-to date. *Mobile* plainly made no such ruling as to agreed-upon rates. If it had, the Commission's suspension power under Section 4, the validity of which was recognized in *Mobile*, would be rendered meaningless with respect to producers' contracted rates. For there is the same modification of the terms and effective dates agreed upon by the parties regardless of whether the change is agreed to at the beginning of a contract, as by a provision for future or periodic rate increases, or by negotiation of a new contract to succeed an expiring contract, as here. As petitioner recognizes, most producer rate changes are mutually agreed to by the contracting parties.

Such a result would fail to give full protection to consumers as to price—the primary purpose of the Act—since under Section 5(a), the only provision under which initial rates may be reviewed, the Commission can give only prospective relief from the imposition of unjust and unreasonable rates and charges. The relative inferiority of the protection accorded under Section 5(a) has recently been recognized by the Court. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

Moreover, as the decisions in *Mobile* and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Divi-*

sion, 358 U.S. 103, show, there is no merit to Sun's assertion that the Commission's action here gives no "meaning or sanctity whatsoever" to gas sales contracts. During the term of a producer-pipeline contract, which (as here) prohibits price changes not permitted by the contract, the contract effectively determines the maximum cost of gas to the pipeline purchaser and provides a seller, such as Sun, with an assured market for a period of years. After the expiration of the contract term, as *Memphis* shows, the producer, though subject to Commission regulation, is free unilaterally to initiate changes in rates or service. Thus, the length of the contract is of interest to producers and pipelines alike even though the obligation of the producer to serve is not automatically terminated by the expiration of its contract.

II

The Commission was also clearly correct in rejecting petitioner's application for a new certificate of public convenience and necessity since the certificate issued to Sun in 1956 already authorized it to make sales to Southern from the same reserves covered by its new application. The language of the earlier certificate shows that the authorization to make sales from Sun's Gwinville Field reserves was not limited to the duration of the contract pursuant to which service was initiated. Moreover, in its application for that earlier certificate, Sun sought a certificate "to authorize the continued sales by Sun" of its gas to Southern, not, as it now contends, authorization for a single "sale" at that time. This was no mistake

since, as we have shown, the 1947 agreement under which service commenced was not in fact a single "sale" but rather an agreement to supply Southern with a designated portion of that company's needs.

Even if there were doubt as to the meaning or scope of the authorization granted by the Commission in the 1956 certificate, the Commission's prior interpretations and practice would refute the contention that the 1956 certificate authorization was intended by the Commission to be restricted to the period covered by Sun's contract. Since the inception of the Act, the Commission had taken the consistent view that a natural gas company's statutory obligation to serve is not limited to the duration of its private contractual obligation. Certificates containing language identical to that used here had been construed, prior to petitioner's certificate, as not limited to the duration of any particular contract. There is no warrant for a different interpretation here. This is particularly so because the Commission, when it has intended to limit an authorization to a specific period, has expressly stated such a time condition.

In our brief in the companion *Sunray* case, No. 335, we also show that petitioner's further assertion that the Commission had no authority to issue a certificate of unlimited duration is equally without merit. And, even if Sun could be thought to have applied for a certificate of limited duration, it accepted the unlimited certificate issued without seeking judicial review and cannot now complain that the Commission should have issued a different type of certificate.

ARGUMENT

I

THE HIGHER RATE IN PETITIONER'S NEW 1957 CONTRACT PROVIDED FOR A CHANGE IN AN EXISTING RATE FOR THE SAME SERVICE AND WAS THEREFORE REQUIRED TO BE FILED UNDER SECTION 4(d) OF THE NATURAL GAS ACT

Starting in 1947, Sun, pursuant to a ten-year contract, sold natural gas to Southern from its reserves in the Gwinville Field, Mississippi. Prior to the expiration of this contract, Sun agreed to continue selling gas to Southern from those reserves at a higher rate under a new twenty-year contract. When Sun sought to file this new contract as an initial rate pursuant to Section 4(c) of the Natural Gas Act (App. *infra*, pp. 51–52), the Commission rejected this filing on the ground that it was a changed rate for the same sales and, accordingly, should have been filed in accordance with the provisions of Section 4(d) of the Act and Section 154.94 of the Commission's regulations (App., *infra* pp. 52, 60–62), relating to rate changes.

Sun contends that the Commission erred in not accepting the filing of the new contract as an initial rate. In this way it would avoid a more effective Commission regulation of this rate for, as a changed rate, the new contract rate was subject to the provision of Section 4(e) of the Act, pursuant to which the Commission, pending a hearing to determine justness and reasonableness of the changed rate, could and did suspend the new rate for five months and permit the rate to become effective thereafter subject to refund of any part found to be unjustified at the

conclusion of the hearing. Because the new rate is higher than the old, Sun would have the burden of proof at the hearing to show that the "increased rate * * * is just and reasonable." Section 4(e), App. *infra*, pp. 52–54. But, if the new rate is an *initial* rate, Sun would be entitled to receive and retain charges collected at that rate, even if unreasonable (without any chance of refund), until the Commission, acting under Section 5(a) of the Act (App. *infra*, p. 54), could investigate, conduct a hearing at which the burden of proof would be on it to show that the rate was not reasonable, and prescribe a reasonable rate for the future. This Court has noted the inferiority of the protection offered to consumers by that procedure. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 389–390. We shall show that there is no support in the language of the statute, the Commission regulations, or the policy and history of the Act, for petitioner's contention that its rate under the new contract is not a "changed rate" or an "increased rate", but an initial rate.

But it should first be observed that the Commission's determination that the new contract rate was a changed rate is not dependent on the duration of the original certificate authorization for these sales. Even if a limited-term certificate had been issued to Sun—which (as we show in Point II, *infra*, pp. 40–49) is not the case—so that Sun would have been free to abandon its service to Southern without further permission, Sun voluntarily entered into the second contract to continue its service and did not abandon it.

Accordingly, the rate and the certificate questions at issue here are to that extent separate and distinct. Sun could prevail in its certificate claim but nevertheless fail in its attempt to be free from Commission supervision of its rates under Section 4 (d) and (e) of the Act.

A. THE COMMISSION'S REGULATION, UNDER SECTION 4 (d) AND (e), OF GAS PRODUCERS' RATES IS NOT LIMITED BY THE DURATION OF THE CONTRACTS UNDER WHICH THEY SUPPLY THEIR GAS TO INTERSTATE PIPELINES, BUT IS BASED UPON THE FACT THAT A CONTINUING SERVICE IS PROVIDED

1. Sun's rate argument (Pet. Br. 38–47) seems to be grounded upon the erroneous premises that the Commission must consider each contract under which Sun serves Southern as a single unique event incapable of continuation; that the Commission does not regulate the *service* which is the subject of such contract or the rates charged (which are of course susceptible of continuation); and that such a contract for a specified number of years is a "sale" of a "specific volume" (Pet. Br. 44) or "batch" (Pet. Br. 47) of gas to which Commission rate regulation is confined in isolation, and not an agreement for the performance of a supply service which, once started, is the subject of continuing rate regulation and may continue independently of the parties' contract.

But it is clear that, under Sections 4 and 5 of the Act, the Commission regulates the "rates and charges" for jurisdictional gas sales or jurisdictional transportations—which the Act refers to generically as "services"—whether such rates and charges are provided for by one or successive contracts or estab-

lished *ex parte* by the seller. It is the operation of supplying or carrying gas which is significant, not the particular legal relationships. Section 4(c) of the Act requires the filing of:

> * * * schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

The rates required to be filed are for actual jurisdictional sales or transportation. If no gas is ever delivered under a contract such as those between Sun and Southern, the contracted rate will never be charged and the filing requirement will never attach. Under Section 1(b) of the Act (App. *infra*, p. 51), Commission jurisdiction over rates and charges does not attach until there is a sale at wholesale or transportation in interstate commerce, and this does not occur unless and until there is a flow or movement of gas in interstate commerce. See *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378, 388–389.

Moreover, the phrase "such * * * services" at the end of Section 4(c) necessarily refers to any "transportation or sale subject to the jurisdiction of the Commission" since there is no other antecedent to which it can refer. This makes doubly clear that, when Congress speaks of a sale or transportation, it is not referring to a single, isolated, individual, or unique event, nor simply to a legal relationship, but to a continuing process of selling or transporting—not to

the sale or transportation of an identified "batch of gas", but to a continuing service.

The general context of the crucial word "service" in the Act is supplied by Section 1(b) (App. *infra*, p. 51), which provides that the "Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale * * * and to natural-gas companies engaged in such transportation or sale * * *" (with qualifications not now material). When the word "service" is used, even without a special immediate context, it refers generically to the transportation and sale to which Section 1(b) provides that the Act shall apply. Thus, Section 7(b) of the Act forbids abandonment of jurisdictional facilities "or any *service* rendered by means of such facilities, without the permission and approval of the Commission" (emphasis added) and makes the standards governing such approval not the expiration of the contract to sell, but the depletion of the supply of natural gas or the public convenience and necessity. See the Commission's brief in *Sunray*, No. 335, at pp. 24–49. So also the last proviso of Section 7(c) and Section 7(g) both use "service" in obvious reference to jurisdictional transportation or sale.[3] And, as we point out in No.

[3] When in 1954 Congress enacted the Hinshaw Amendment (Section 1(c), *infra*, p. 51) exempting transportation, or sale for resale, in interstate commerce wholly within the consuming State, it adopted the same generic term "service" to describe the exempted transportation or sale in providing for "[a] certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and *service* * * *" (emphasis added).

335 (pp. 18–24), that a sale at wholesale price by a natural gas company necessarily encompasses the rendering of a service is also shown by Section 7(e) (App. *infra*, p. 56). Under that section, a prerequisite to issuing any certificate is that an applicant is "able and willing properly to do the acts *and to perform the service proposed* * * *" (emphasis added). Since a certificate under Section 7(c) is required before a sale at wholesale price may be made in interstate commerce, whether or not pipeline transportation is involved (see *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672), the sale and delivery of gas by a producer must constitute a service within the meaning of the Act.

2. Sun's 1947 contract with Southern (R. 32–50) itself illustrates the continuing *service* nature of the industry activities regulated by the Act. The contract does not simply designate any "specific volume" (Pet. Br. 44) or "batch of gas" (Pet. Br. 47), as Sun's brief would have it. Rather, it goes to considerable pains to define the service to be rendered and to state the seller's obligations and buyer's rights in terms which show that readiness to serve is an important element. Article IV, filling almost five pages of the printed record, deals with "Quantities of Gas." Southern agreed annually to take or pay for at least 20% of the gas it needed in operating its pipeline system as it was then constituted, "or as same may be enlarged, extended or expanded," from the Gwinville Field (R. 35). On six months' notice Southern had the option to increase that minimum to 30%.

Contract language could scarcely be plainer than the

"daily take" provision that a continuing service was to be provided ~~provision~~ (R. 36):

> Buyer shall have the right to take and purchase from Seller hereunder at any time, and from time to time, a daily quantity of gas equal to one hundred fifty per cent (150%) of the minimum in effect on the date of purchase * * * from Seller hereunder. * * *

There follow provisions for taking a "reasonable quantity of gas during each calendar month" from each connected well; for the taking of gas "at as uniform a rate as is possible" (R. 37); for reduction of the minimum take if it does not appear reasonably certain that seller will be able to deliver the quantities provided for in the following 3 years (R. 38–39) and that (R. 39):

> * * * Seller shall not be obligated to produce its wells * * * at a rate which in Seller's opinion will be detrimental to the ultimate recovery of gas from Seller's lands and leaseholds in the field. * * *

That the 1947 contract was not solely a sale of gas, but was rather an agreement to enter upon a service, is also shown by the fact that the agreement did not transfer or purport to transfer title to any of Sun's gas to Southern. See, *e.g.*, 1 Williston on Sales, § 1; Uniform Sales Act, § 1. Thus, Sun remained in "control and possession" of the gas and responsible therefor until delivery (R. 34). The contract expressly provides that Sun was not purporting to dedicate to Southern any specific portion of its gas reserves in Gwinville Field (R. 46). And, as we have seen, the quantity of gas to be sold was not definitely fixed at

the date of the agreement, but depended on the buyer's needs.

3. All these factors show that the 1947 agreement did not constitute a single "sale" (as that term is used in the Natural Gas Act), but an agreement to provide a service—a continuing series of sales—and they explain why Section 4(c) requires rates for sales to be filed, but contracts, as such, to be filed only to the extent that they may "affect or relate to such rates * * * and services." While, as the petitioner states (Br. 21), a sale is a contract, it does not follow, contrary to Sun's suggestion, that every contract to sell is also a jurisdictional sale, or conversely that a jurisdictional sale under this Act is nothing more than the bare contract.

The important factor is that the producer has continued and is continuing to supply gas in interstate commerce. If that is so, the Commission has continuous authority under the Act to regulate the producer's rates and service—whatever the form its legal relationship with the buyer may take. Certainly, if Sun had for a decade been selling to Southern without a formal contract but in a series of day-to-day "sales," an increase in Sun's rates comparable to that provided here in the 1957 contract could not be said to be beyond the Commission's review authority because the new rates were embodied in separate new "sales." Similarly, in the present case, it makes no difference to the Commission's authority that the old contract for a ten-year term has expired and a new one for ten years has been made—at least so long as the new con-

tract envisages continuity of the same service performed in the past.

The basis in the Act's policy and history for Congress's clear concern with the continuity of service is discussed more fully in the Commission's brief in the companion case, *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, No. 335, at pp. 18–36. The various terms of the Act—including the critical terms "sale" and "service"—must be read in the light of this general legislative purpose to give to the Commission, and not to the producer or the pipeline, the authority to determine when and upon what terms service shall be continued or terminated.

B. SALES UNDER THE NEW CONTRACT CONSTITUTED A CONTINUATION OF THE SERVICE RENDERED UNDER THE 1947 CONTRACT SO THAT THE INCREASED RATE WAS A CHANGED RATE SUBJECT TO FILING UNDER SECTION 4(d) OF THE ACT

1. The court below was clearly correct in holding that the new contract between petitioner and Southern provided for a continuation of the *service* which Sun had rendered for ten years (R. 150). Sun's basic answer (Br. 44–46) is that it was not rendering a service at all under either contract. Its statement that "the contracts [did not] constitute the 'same' service" (Br. p. 45) is obviously beside the point since it is not the contracts themselves but the performance thereunder which constitutes the service. Indeed, Sun recognized this in the court below; it conceded there (Br. for Pet. in C.A. 5, No. 17040, p. 31) that, if its performance under the first contract were regarded as a service, the second contract merely provided for a continuation of that service:

> * * * Moreover, if we assume, *arguendo,* without admitting that Sun's first sale must somehow be broadly construed as a "service," there has been no proposed abandonment of such "service" because Sun's second contract, rather than an abandonment, is a continuation of "service" to the same pipeline company from the same gas field. * * *

This concession was, of course, compelled by the record, for it is not questioned that gas from the same source would move through the same set of pipes and valves at the same points into Southern's lines under the new contract as under the old. Nor is there even any contention that the new contract dedicated gas from new or additional reservoirs to the Southern sales. These facts are evident from the two agreements filed with the Commission. In the agreement of August 26, 1947, it was stated under the heading of "Gas Sold and Purchased" that (R. 33)—

> * * * this agreement shall apply to all merchantable natural gas that may be produced from all wells now drilled or which may hereafter be drilled on all lands and leaseholds now or hereafter owned by Seller located in the Gwinville Gas Field as now defined, or as it may be extended, and all of Seller's proportionate part of all merchantable natural gas that may be produced from unitized or pooled lands and leaseholds owned or controlled by Seller, and the proportionate part of such gas which belongs to other owners and leaseholders in such unitized or pooled lands and leaseholds which Seller has or shall hereafter from time to time have the right to market * * *.

The contract between Sun and Southern dated August 1, 1957, provides under the heading "Gas Sold and Purchased" that (R. 63)—

> * * * this agreement shall apply to all merchantable natural gas produced from leases now or hereafter * * * owned by Seller in said Field and Seller's proportionate share of all gas produced from lands, leases and production units owned by Seller and others, jointly. * * *

"Field" is defined as (R. 62)—

> The area in Simpson and Jefferson Davis Counties, Mississippi, known as the Gwinville Gas Field as the same Field is presently defined or as the same may be entered by wells which hereafter may be drilled.

Both the old and the new contracts provided for the sale of gas produced from all leaseholds held by Sun or in which it had an interest within Gwinville Field. Thus, the source of the gas sold on the expiration date of the old agreement was identical with the source of the gas to be sold under the new agreement. Moreover, the buyer is the same, and the new contract does not provide for any facilities not provided for under the old contract (R. 34, 71). These factors demonstrate that the 1957 contract on its face called for a continuation of the same jurisdictional service as that rendered under the 1947 contract.

2. In these circumstances, the Commission was clearly correct in treating the higher rate agreed upon in the new contract as a changed rate required to be filed pursuant to Section 4(d) (App., *infra*, p.

52) rather than as an initial rate for a service not previously rendered. Section 4(d) provides in pertinent part that:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force * * *.

The term "any such rate" refers to the "rates and charges for any transportation or sale subject to the jurisdiction of the Commission" mentioned in the preceding section, Section 4(c). This "sale," as we have seen (*supra*, pp. 15–23) is not an isolated contract but the continuing *"service"* actually provided. If a higher rate is sought to be charged for the same performance as that which the seller has long rendered to its purchaser, the schedule reflecting that higher rate, although embodied in a new contract, must be filed under Section 4(d) as a "changed" rate, and, if suspended by the Commission, justified by the seller as an "increased rate" under Section 4(e).

This result is unaffected by the fact that the second contract may provide for some variations in the terms of service, for Section 4(d) expressly contemplates that the service, as well as the rate, may be changed, and prescribes the same procedures for both. Since service by natural gas companies is almost always

rendered pursuant to a contract, Section 4 (d) and (e), and the related hearing, suspension and refund powers, would largely be rendered meaningless if a mere variation in the terms of service were automatically to constitute the initiation of a *new* service. Whether or not a contract has instituted a new service justifying an initial rate filing must depend on the facts of the particular case, and it would be difficult to adopt a hard and fast rule. For this reason, we need contend no more than that on the facts of this case—where there has been no change in the physical facilities, source of the gas, or the buyer—the Commission and the court below were entirely correct in concluding that the same service, in a jurisdictional sense, was continued by the second contract, and that, accordingly, the higher rate provided for by the new contract was a changed rate, not an initial rate for a new service.

C. UNDER SECTION 4 OF THE ACT AND THE COMMISSION'S REGULATIONS, A RATE SCHEDULE CAN BE TERMINATED ONLY AFTER A NOTICE OF CHANGE IS FILED PURSUANT TO SECTION 4(d)

1. Petitioner, after arguing that its 1947 contract was a single "sale," contends (Br. 40) that, when the Commission accepted the contract for filing as a rate schedule, all of the provisions of the contract, including the termination date, became self-operating parts of the rate schedule without regard to the provisions of Section 4(d) of the Act, which requires natural gas companies to file notices of changes in any jurisdictional rate, charge, or service. From this contention, Sun concludes (Br. 40–41) that the rate schedule consisting of the 1947 contract automatically ceased to exist at the end of the contract term when the new

1957 contract was to become effective as a rate schedule, so that the latter could not be a change in a subsisting rate schedule.

This contention completely ignores the Commission's regulations under which those contract provisions defining the service and the price to be paid for it initially are the "rate," while other provisions of the contract, such as those for later automatic changes in price, or for termination of service, are not. That is, the contract not only embodies the rate in effect at the time the Commission jurisdiction attaches and as such constitutes the filed rate schedule, but in addition it is also a contract relating to or affecting such rate which, as such, must also be filed under Section 4(c). While the contract may expire of its own terms as a contract, its existence as a filed rate schedule can be terminated only by compliance with the provisions of Section 4(d). Accordingly, Sun's 1947 contract, which it filed as its Rate Schedule No. 55, did not terminate as a rate schedule merely because the contract term expired, but remained in effect on September 3, 1957, when service would continue under the new contract, since petitioner had not filed a notice of termination with respect to its Rate Schedule No. 55.

The Commission's regulations, as well as its administration of the Act since its inception, make this clear. The rate schedule for independent producers is defined by Section 154.93 of the Commission's regulations (*infra*, p. 60) to mean

> * * * the basic contract and all supplements or agreements amendatory thereof, effective and

applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Under this definition independent producers are permitted to file their contracts as their rate schedules, instead of filing tariffs providing for uniform rates for comparable services as previously required of all natural gas companies, and still required of natural gas companies other than independent producers (18 C.F.R. 154.1–154.86).[4]

[4] Prior to the adoption of its tariff-service agreement regulation in 1948 by Order No. 144 (13 F.R. 6371, 6838) (see *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103), "rate schedule" under the Natural Gas Act for all natural gas companies alike was defined as the sales contract and supplements thereto. See Commission Order No. 141, Section 154.1, 12 F.R. 8461.

Under Section 205 of the Federal Power Act, 16 U.S.C. 824d, which is virtually identical to Section 4 of the Natural Gas Act, the Commission's definition of rate schedule for electric utilities is as follows (Section 35.1 of the Commission's regulations, 18 C.F.R. (1949) 35.1):

> The term "rate schedule" as used in §§ 35.1 to 35.20, inclusive, shall include and mean any contract, agreement, lease of facilities or other writing, including supplements thereto, which specifies or affects the rates and charges to be assessed or collected for the transmission or sale of electric energy subject to the jurisdiction of the Commission, or which establishes any rule, regulation, classification, or practice affecting such rates and charges or the service rendered or to be rendered.

This definition has remained unchanged since it was adopted in 1938 (Commission Order No. 50, Section 35.1, 18 C.F.R.

Section 154.94(c) of the Commission's regulations (App., *infra*, p. 61) shows that contract clauses for subsequently changing the initial rates or services are not effective as rate filings:

> The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

Any such subsequent change must, therefore, be separately filed as a change pursuant to Section 4(d) of the Act and Section 154.94(a) of the Commission's regulations, *infra*, pp. 60-61, and under Section 154.94 (b) of the regulations, *infra*, p. 60, all changes must be filed not less than 30 and not more than 90 days before the proposed effective date of the change. Section 154.97 of the regulations, *infra*, p. 63, also specifically provides that when a rate schedule as such "is proposed to be cancelled or is to terminate by its own terms and no new rate schedule" is to be filed in its place, the filing company shall give the Commission notice at least 30 days prior to the proposed effective date of the termination, together with a statement showing the reason for the cancellation or termination. Elsewhere, the Commission has expressly provided that a termination is a change (Sections 2.4 and 2.52 of the Commission's regulations, 18 C.F.R. (1949) 2.4 and

---

(1939) 35.1) and is virtually the same as that under the Natural Gas Act prior to adoption of the tariff-service agreement regulations in 1948.

2.52, *infra*, pp. 58–59). This Court has approved that construction in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 423–424, discussed *infra*, pp. 31–33.

In this way, the regulations assure the continued existence of a rate schedule after the expiration of the underlying contract, at least until the natural gas company takes steps to cease the service to which the rate schedule applies.[3] That the Commission has relieved independent gas producers of the burden of restating on a separate document (called a "rate schedule") those terms of their contracts in effect at the date service is to commence does not change the fact that the Commission was free to treat, and has treated, only presently effective parts of a contract as the statutory rate schedule.

2. The courts of appeals have consistently agreed with the Commission that, under the Natural Gas Act and its regulations, rate changes contemplated by contracts filed as rate schedules are not self-executing and can become effective only after compliance with the

[3] The original rules of practice and regulations under the Natural Gas Act, Commission Order No. 52, 3 F.R. 1681, effective July 11, 1938, did not specifically state that periodic or future changes were not self-operative. By order of December 20, 1938, however, the Commission required natural gas companies having on file with the Commission agreements providing for changes to become effective at a future date to give thirty days' notice of the changed rate or service pursuant to Section 4(d) of the Act and the Commission Order No. 59, 4 F.R. 1185. The original rules and regulations required natural gas companies to give thirty days' notice prior to the termination date of a rate schedule. Commission Order No. 52, Section 54.13, 3 F.R. 1688.

notice provisions of Section 4(d). In *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 121 F. 2d 159 (C.A. 8), the court affirmed the Commission in suspending, as changes, increased rates provided by price escalation clauses in contracts filed as rate schedules. In *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F. 2d 388 (C.A. 5), certiorari denied, 332 U.S. 770, the court held that, after passage of the Natural Gas Act, favored-nation clauses ceased to be self-operative and that the rates provided thereby could become effective rates only after filing in accordance with the Act.

Similarly, in *Bel Oil Corp.* v. *Federal Power Commission,* 255 F. 2d 548 (C.A. 5), certiorari denied, 358 U.S. 804, the Fifth Circuit rejected contentions that an increased rate agreed upon in a contract escalation clause need not be filed as a change. This case is also of interest because, prior to the date of the contracted increase, no rate schedule had as yet been filed in compliance with the *Phillips* decision, so that there was no rate schedule on file when the escalated price was to become effective. See also *Gulf Oil Corp.* v. *Federal Power Commission,* 255 F. 2d 556 (C.A. 5); *Sun Oil Co.* v. *Federal Power Commission,* 255 F. 2d 557, 559 (C.A. 5), certiorari denied, 358 U.S. 804.[6]

[6] Petitioner, in attempting to distinguish the *Mississippi Power & Light Company* and *Bel Oil* cases from the present situation (Br. 43–45), relies basically on its erroneous view that its earlier rate schedule had expired. But the *Bel Oil*, *Gulf Oil*, *Sun Oil*, and *Cities Service* cases, cited in the text, could not, in any event, be distinguished on that ground since there had been no previous rate-filing in those cases.

In *Cities Service Gas Producing Co.* v. *Federal Power Commission,* 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911, the suspension of an increase under a clause of a contract in effect on June 7, 1954, was sustained. The independent producer's rate first tendered for filing after the *Phillips* decision on June 7, 1954, was set out in letters between seller and purchaser dated June 14 and August 24, 1954. The rate was an increase under a "prevailing field price" adjustment clause over the rate provided in the original contract of April 30, 1953, as previously adjusted on December 23, 1953, and as being collected on June 7, 1954. But prior to the tender of the increased rate of June 14 and August 24, no rate had been filed by the producer. Nevertheless, the Tenth Circuit held the attempted increase invalid and ineffective for failure to comply with Section 4(d). See also the recent opinion of Mr. Justice Reed in *Episcopal Theological Seminary* v. *Federal Power Commission,* 269 F. 2d 228 (C.A.D.C.), certiorari denied *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission,* 361 U.S. 895.

Thus, since the inception of the Gas Act, both the Commission and the courts have recognized the applicability of Section 4(d) to *rate* changes provided for by contracts, where those contracts have been filed, or subject to filing, as initial rate schedules. No reason has been suggested why the same notice requirements are not equally applicable to *service* changes including termination of service, as here. In fact, this Court has declared that they are, in a case involving electric rates under Section 205 of the Federal Power Act, 16 U.S.C. 824d, which is

virtually identical to Section 4 of the Natural Gas Act. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 423–424. It was there held that the termination of contractual obligations between parties does not permit cessation of a service previously rendered under a contract, except by complying with the notice requirements of the statute and the Commission's rules. The seller argued that its sales contract had been held illegal and unenforceable under the antitrust laws in a recent decision in another case and was, therefore, a nullity; that it could not be compelled to continue service in the absence of a valid contract; and that in those circumstances the Commission improperly fixed a rate for the service which had been defined by that contract notwithstanding its invalidation 343 U.S. at 421). In response to the seller's argument that it could discontinue its service, the Court stated (343 U.S. at 423–424):

> If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shortly after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205(c), filed with the Commission the contract here attacked and then designated by the Commission as "Penn Water's Federal Power Commission Rate Schedule No. 1." Section 205(d) provides that "no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public." Here instead of following the procedure for changing existing services and practices—a procedure

which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order.

So here, Sun may not assert that its Rate Schedule No. 55 expired of its own force, but must follow the procedure prescribed by the corresponding provisions of the Gas Act, *i.e.*, Section 4 (d) and (e), and the Commission's rules supplementing those provisions.

D. THIS COURT'S DECISIONS DO NOT IMMUNIZE RATE INCREASES EMBODIED IN "NEW" CONTRACTS FROM COMMISSION REVIEW UNDER SECTION 4(d)

Sun urges (Br. 41–44) that even if the language of Section 4 did not compel the Commission to accept the new contract as an initial filing, this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, did so, because, it says, that opinion shows that a natural gas company's contracts are wholly inviolate and free from all review except under Section 5. Such a construction of *Mobile* is untenable. The contract "interference" charged in this case is that suspension of the changed rate (in the 1957 contract) will delay the effectiveness of that higher rate as contracted for and will extend the effectiveness of the previously contracted rate beyond the date agreed upon by the parties. Of course, this is no different or greater interference than is necessarily involved if the suspension power is ever to be given effect where the parties have a continuing contract.

The *Mobile* decision tends to refute, rather than to support, Sun's argument, for while the Court, observing that the Act "evinces no purpose to abrogate

private rate contracts as such" (350 U.S. at 338), held that Section 4(d) did not permit natural gas companies to file rate changes *prohibited* by the terms of their contracts, it nevertheless noted that the review proceeding under Section 4(e), in which the Commission is given interim suspension power, remained, "like a § 5(a) proceeding, simply a review by the Commission of a rate established by the natural gas company". 350 U.S. at 343. *Mobile* recognized the Commission's authority to review any *contracted* change in a contracted rate or service, and to suspend the change pending hearing, as provided for in Section 4(e). The Court found that Section 4(d), in requiring notice of changes, imposed a prohibition on natural gas companies and did not grant them a power to act in *abrogation* of their contract obligations. It emphasized that the Natural Gas Act, unlike the Interstate Commerce Act, contemplates the establishment of rates by individual contracts. And it pointed out that the conclusion that the Natural Gas Act did not empower natural gas companies *unilaterally* to change their contracts supported the purposes of the Act by insuring a continuity of supply at a relatively stable rate (350 U.S. at 344):

> * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor

> can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate. * * * On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

Thus, the decision in *Mobile* was not that private contracts, pursuant to which relations in the natural gas industry are normally adjusted, are not subject to regulation at all. Rather, the Court held only that, to achieve the purposes of the Act, it was not necessary to permit natural gas companies *unilaterally to abrogate* the terms of their contracts through use of the filing and change provisions of Section 4.

When the scope of the *Mobile* ruling came before the Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, the Court was at pains to make it clear that the integrity of contracted rates was subject to the "overriding authority of the Commission" to reduce rates found unreasonable and, specifically, to delay the earliest effectuation of contracted rate changes, if necessary to permit Commission review (358 U.S. at p. 113–114):

> * * * This concern was surely a proper one for Congress to take into account in framing

> its regulatory scheme for the natural gas industry, cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, and we think that it did so not only by preserving the "integrity" of private contractual arrangements for the supply of natural gas, 350 U.S., at 344 (subject of course to any overriding authority of the Commission), but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review* [emphasis added].

The Court was called upon to determine whether, under *Mobile*, a natural gas company could file an increased rate under Section 4(d) where the purchaser had agreed to the filing but not to the specific rate filed. It held that the filed-rate procedure did not require bilateral agreement on the specific rate change. Particularly significant here is the fact that, in *Memphis*, the entire Court accepted the principle that agreed-upon changes in rates could be filed pursuant to Section 4(d); indeed, the three dissenting Justices believed that the procedures of Section 4(d) were available only in the event of such mutual agreement on a specific rate. That, of course, is precisely the situation in this case.

Once it is recognized that the suspension power of Section 4 applies to agreed-upon changes, it is inescapable that suspension of such a change may modify the terms and effective dates agreed upon by the parties. For such a modification by suspension results regardless of when the change is agreed to by the parties—whether at the beginning of the contract

by inclusion of escalation or favored nation clauses or, as here, by negotiation of a new contract to succeed an expiring contract. The fallacy of Sun's argument in this respect is demonstrated by its attempt to distinguish the cases relied upon below which had held that changed rates provided for by escalation or favored-nation clauses were subject to the notice procedures of Section 4(d) and therefore suspendible. These cases are different, we are told, because there the new rates were clearly changes. Yet despite the fact that in those cases the same type of contract modification as here resulted from a five months' suspension by the Commission, in this case Sun argues that the new rate must be an initial rate because suspension would modify the terms agreed upon by the parties.

Sun's position would obviously permit natural gas companies to escape, by contract, the Commission's review jurisdiction under Section 4(e), for, under *Mobile,* unilateral increases not permitted by contract must be rejected by the Commission. If Sun were correct, no mutually agreed-upon rate—which would mean most producer rate changes—would constitute a changed rate within Section 4(d). Such a result would not only ignore the consistent practice of the Commission, approved by the courts, *supra,* pp. 26–33, but, of even greater significance, it would not give "full protection coverage to the consumer as to price," the primary purpose of the Natural Gas Act. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 388, 389; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591.

This would be so because under Section 5(a) of the Act (the only provision under which initial rates may be reviewed) the Commission can give prospective relief only. As observed recently in *Atlantic Refining Co.* (360 U.S. at 389), gas purchasers "have no protection from excessive charges collected during the pendency of a § 5 proceeding," and receive inferior protection under that Section for the further reason that "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appear nigh interminable."

The ruling in the *Atlantic Refining Co.* case also tends against Sun's position here. The Court there concluded that in a certificate proceeding the initial price must be given most careful scrutiny and, if necessary, be conditioned so that the consumer would be protected as effectively as he would be under the changed-rate procedures of Section 4(e). Significantly, the Court stated that the imposition of a rate condition in a certificate proceeding would not interfere with contract rights, contrary to *Mobile* (360 U.S. at 391-392):

> * * * [such a condition] is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity * * *. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties.

> Rather, it conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. * * *

The Court's decisions in *Mobile* and *Memphis* also show—contrary to petitioner's statement (Br. 47) that the Commission "has here held, in effect, that the provisions of a gas sales contract between a producer and a buyer, which relate to both quantity and delivery terms, have no meaning or sanctity whatsoever"—that gas sales contracts have very real legal and economic significance notwithstanding the conclusion that abandonment or change of service requires Commission approval. *Mobile* shows that a producer may not file a changed rate under Section 4(d) if such a change is not provided for by its sales contract. The Sun-Southern contracts are typical of producer gas sales contracts in that they provide for periodic price escalations (R. 46, 77). Such a contract effectively determines the maximum cost of gas to the pipeline purchaser,[7] although the rates filed by a producer pursuant to contract are subject to Commission decrease after review as to their justness and reasonableness. And *Memphis* shows that, after the contract expires, the producer, while still obligated to sell, is free to file changes in rates or service pursuant to Section

[7] In the absence of a finding under Section 5(a) of the Act, *infra*, p. 54, that a contract rate is "so low as to adversely affect the public interest," the Commission has no power to modify the contract rate, even if the producer made a bad bargain. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355.

4(d) at will, since there is no longer any contractual inhibition on such filings. See *Memphis*, 358 U.S. at 113–114. Accordingly, the contract assures a producer of a market for at least the years of its duration and the rate provisions provide a substantial measure of assurance that the pipeline's cost of gas will not exceed a fixed level. In the absence of a contract such as those involved here, neither of these assurances would exist; producer-pipeline contracts are therefore mutually beneficial. These considerations explain the willingness of both Sun and Southern to enter into a new twenty-year contract for continued gas sales as well as the importance to the producer of producer-pipeline contracts under which a service is to be rendered even though the obligation of the producer to serve is not terminated by the expiration of its contract.[8]

II

PETITIONER'S APPLICATION FOR A NEW CERTIFICATE AUTHORIZING THE SALES COVERED BY ITS 1957 CONTRACT WAS PROPERLY REJECTED SINCE THE REQUESTED AUTHORIZATION EXISTED UNDER THE PREVIOUSLY ISSUED AND EXISTING CERTIFICATE

A. Sun contends that the Commission also erred in rejecting its application for a certificate of public convenience and necessity authorizing its continued sales to Southern from the Gwinville Field pursuant to the contract which was to become operative on September 3, 1957. As the court below held (R. 151), the Commission was clearly correct in rejecting that application because the certificate issued May 28, 1956

[8] See also the Commission's brief in *Sunray*, No. 335, at pp. 38–47.

(*supra*, pp. 3–4, 21–23), already authorized the making of such sales. That certificate and the application requesting its issuance show without question that the Commission did not intend to issue a certificate of limited duration and that Sun did not request a time limitation.

As Sun has expressly recognized (Reply to Brief in Opposition, p. 3), the scope of the certificate issued to it on May 28, 1956, must be determined from an examination of the language of that certificate. It authorized "the sale by Applicant of natural gas in interstate commerce for resale * * *" as described in the order and in the certificate application and accompanying exhibits (R. 109–110). That the Commission was authorizing the physical acts or deliveries encompassed by any sales to be made pursuant to the contract, not authorizing the contract itself, is made clear by the following portions of the order granting the certificate (R. 110):

> (C) The certificate is not transferable and shall be effective only so long as Applicant *continues the acts or operations hereby authorized* in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.
>
> (D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the *service* herein authorized * * * [emphasis added].

These portions of the order show that the Commission did not uthorize sales or service by Sun only for the remainder of the contract term. And the Commission's understanding that it was authorizing a series of sales or a service—not a single limited sale—is also demonstrated by other portions of the order. In the first two paragraphs, the Commission expressed its belief that the sales would involve the rendering of service (R. 102):

> Each of the above Applicants has filed an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, authorizing Applicants to render *services* as hereinafter described, subject to the jurisdiction of the Commission, all as more fully represented in their respective applications which are on file with the Commission and open for public inspection.
>
> Applicants produce and sell natural gas * * * [emphasis added].

As the court below held (R. 151), there is nothing in the language of the certificate even to suggest that the authorization for Sun to render the service described was limited to the duration of the 1947 contract. The service described consisted of the acts or operations involved in the sale of gas by Sun to Southern from Gwinville Field. The Commission specifically stated, as we have noted, that the "certificate * * * shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act" (R. 110).

There is no merit to Sun's contention (Br. 27–29) that, by authorizing "the sale" of gas by Sun, the Commission intended to treat all of the separate sales that might be made under the contract as "the [one] sale," and to treat its authorization accordingly. As we have discussed, *supra*, pp. 15–21, the Commission's rate regulation is directed to the service rendered and rates charged therefor, not primarily to the contracts for that service. Under Section 7 (c) and (e), natural gas companies must seek Commission authorization for the acts or operations of making such a sale in interstate commerce. In this case, the acts or operations authorized were the separate acts of selling gas by Sun to Southern from its Gwinville Field reserves. The 1947 contract of sale, even if loosely considered a "sale," would not in itself be such an act or operation.

Indeed, Sun's certificate application refutes its present argument that the 1947 contract was a single sale or even that all the deliveries pursuant to the contract were "a sale". If Sun had in fact desired a certificate limited in duration to the period of the 1947 contract of sale it would have been simple to say so explicitly; but it did not.[9] While the contract was in

[9] In contrast, Sunray Mid-Continent Oil Company, petitioner in No. 335, has insistently made express requests for certificates of limited duration by seeking authorization to make sales "only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time" (R. 23–24 in No. 335, this term; R. 18–19 in No. 814, Oct. Term 1956.

existence for ten years, Sun at no point in its application stated that it sought a certificate for that period only. Instead, it merely sought a certificate "to authorize the continued sales by Sun of its gas" to Southern (R. 26), which had been commenced under its 1947 contract prior to this Court's decision in *Phillips, supra,* on June 7, 1954, and it indicated that it was seeking authorization only for "the sale of natural gas in the circumstance above described" (R. 29). Sun's reference in its application to continuing its sales is inconsistent with its present claim that it regarded the contract as one sale. And Sun's reference to "sales" in its application was clearly not a mistake, for, as we have shown in Point I, *supra,* pp. 18–20, the 1947 contract was not a sale as such, but merely an agreement to supply Southern with a designated portion of that pipeline's annual line requirements, provided the amount of gas called for was available from Sun's Gwinville Field reserves.

B. If there were any question as to the meaning of the words used in the certificate issued to Sun, it would be dispelled by the prior interpretations and practices of the Commission. Thus, on July 25, 1955, nine months before Sun's certificate was issued, the Commission had refused to issue a certificate of limited duration to an independent producer which

---

Similarly, Stanolind Oil and Gas Company (now Pan American Petroleum Corporation) in its certificate application filed October 4, 1954, in Commission Docket No. G–4063, asked "that said Certificate provide for the expiration thereof simultaneously with the expiration of said gas sales contract, and authorize Applicant to cease said sale at said time."

had specifically requested a certificate providing for its own expiration upon the expiration of the filed gas sales contract. *Sunray Oil Corporation,* 14 F.P.C. 877, 878.[10] There, as here, the certificate was to "be effective only so long as Applicant continues the acts or operations hereby authorized * * *."

This language, which is standard in Commission certificates, was also used in the grandfather certificate issued in 1945 to Panhandle Eastern Pipe Line Company (4 F.P.C. 1081). The certificate covered Panhandle's sales of gas for resale to Michigan Consolidated Gas Company under fifteen year contracts that expired in 1951. When Panhandle sought partially to abandon its service to Michigan Consolidated in 1951, the Commission found, *inter alia,* that the mere expiration of the contracts did not permit such abandonment of service. *Panhandle Eastern Pipe Line Co.,* 11 F.P.C. 167, 172, vacated for reconsideration on other grounds, *sub nom. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 204 F. 2d 925 (C.A. 3).

Thus, prior to the issuance of petitioner's certificate in May 1956, there had been two specific determinations that certificates containing language identical to that relied upon here were not of limited duration. It is true that in the *Sunray* case, *supra,* the Commission had held that it did not have the power to issue a certificate for a limited term and that the

[10] The Commission's refusal to grant a limited-term certificate, on the ground that it lacked power to do so, was affirmed on other grounds in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed and remanded, 353 U.S. 944.

ruling of the Commission was reversed by the Tenth Circuit. However, this reversal post-dated the issuance of the certificate to Sun and does not affect the intent of the language used by the Commission in issuing the certificate.

Sun's contention that the Commission intended to issue a certificate limited to the term of its contract is also inconsistent with the fact that, since 1942, the Commission had expressed its view that the expiration or termination of a contract did not, in itself, constitute grounds for abandonment. *E.g., United Gas Pipe Line Company,* 3 F.P.C. 3. See also the discussion in our brief in *Sunray,* No. 335, pp. 39–42. Moreover, at the expiration of a certificate specifically limited in duration, the Commission has permitted cessation of service, without additional abandonment authorization under Section 7(b). *Phebus Pipe Line Co.,* 9 F.P.C. 384.[11] In these circumstances, it would be incredible to suppose that the Commission, without any explanation as to a change in policy and without any explicit statement, would have issued a limited-term certificate to Sun simply because its contract with Southern was for a term of years. Indeed, when the Commission, prior to issuance of Sun's certificate, had intended to limit the authorization to serve under a certificate to a fixed term, it had done so by an express condition as to time in granting the certificate. See, *e.g., Ray Phebus,* 2 F.P.C. 1044; *Louisi-*

[11] The Commission, thus, takes no issue with petitioner's conclusion (Br. 32–38) that authority to abandon service is not required under Section 7(b) if the certificate authority has expired by its own terms. No claim to the contrary has been made by the Commission.

ana-Nevada Transit Co., 2 F.P.C. 546; *Southern Natural Gas Co.*, 8 F.P.C. 688; *Texas Gas Transmission Corp.*, 9 F.P.C. 1062.

C. Petitioner's further claim (Br. 29) that the duration of the 1956 certificate must have been limited to the life of the 1947 contract because the Commission has authority only to issue the certificate upon the terms sought by petitioner (or to condition the grant on petitioner's accepting a certificate of unlimited duration) is also without merit for the reasons set forth in our brief in *Sunray*, No. 335, at pp. 21–24, 50 *ff*. See also Point I *supra*, pp. 15–43. In brief, Sun's contention fails to recognize that, by selling gas to Southern, it was necessarily rendering a service subject to the control of the Commission as to abandonment or termination.

Petitioner's certificate clearly did not require a perpetual service. Even if Sun had requested a limited-term certificate, the refusal so to limit the duration of the authorization would not have involved a Commission determination that the applicant would be required to continue its sales beyond the term of its contract. As we discuss in No. 335, pp. 50 *ff*, such a requirement could, in fact, occur only if (1) Sun's reserves underlying its sales are not depleted at the expiration of the contract term, (2) Sun seeks to abandon its service pursuant to Section 7(b) of the Act, and (3) the Commission refuses to authorize such abandonment. In the present case, such an issue is not present, since petitioner has made no effort to cease its service to Southern; on the contrary, it voluntarily

entered into a new twenty-year contract for a continuation of the service rendered since 1947.

These considerations also show the irrelevance of the contention (Br. 30–31) that the Commission lacked authority to require sales after termination of the 1947 sales contract and hence could not condition the certificate by requiring sales in excess of the "'quantity of gas called for in this agreement.'" It should be added that, in any event, the quantities which the contract contemplates might be sold would not necessarily be sold in the ten-year term of that contract. That would be true only if the contract had required a fixed quantity to be delivered during the contract term. But the annual minimum-take obligations of Southern depended on its own requirements; the percentage of those requirements which Southern could take, could, at its option, be increased from 20% to 30%, and the daily take could be increased to one and a half times the minimum (*supra*, p. 18). In such a situation it is impossible to guess at the precise quantity of gas covered by a contract at the time the Commission certificates a service. The various contentions that the Commission could not, by issuing the certificate, require petitioner to sell more gas than that covered by its contract are, thus, based on the erroneous premise that the certificate imposes such an affirmative requirement.[12]

In sum, the Commission in 1956 authorized the continuation of the service by Sun to Southern which had

[12] The Commission believes, however, that its authority with respect to abandonments is in no way limited by the "production or gathering" exception in Section 1(b) of the Act. See the discussion of this point in our brief in No. 335, at pp. 53–61.

commenced pursuant to the 1947 agreement, but the Commission did not limit this authorization to the duration of that agreement. The service rendered thereunder—sales and deliveries by Sun from its Gwinville Field reserves to Southern—was physically the same as that contemplated by the 1957 agreement, *supra*, pp. 21–23. It follows that no new certificate authority was necessary for Sun to continue its service to Southern under the latter agreement.

D. Finally, even if Sun, as it now claims, applied for a certificate of public convenience and necessity limited to the life of its contract, it actually accepted a certificate without express limitation and did not seek rehearing and review of the Commission's order granting that certificate. In these circumstances, petitioner cannot now complain that the Commission should have issued a limited certificate in the earlier proceeding, having waived any rights it might otherwise have had under Section 19(b) of the Natural Gas Act, *infra*, pp. 57–58, by not challenging the order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
Attorney.

WILLIAM W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
PETER H. SCHIFF,
Attorney,
Federal Power Commission.
MARCH 1960.

APPENDIX

1. The Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows:

Section 1. [15 U.S.C. 717] * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4. [15 U.S.C. 171(c)] * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission

shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Sec. 7. [15 U.S.C. 717f] * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available

supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or

denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * *

Sec. 19. [15 U.S.C. 717r] * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be

taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs, 346 and 347).

* * * * *

2. The Federal Power Commission's Rules and Regulations, 18 C.F.R., provide in pertinent part as follows:

Sec. 2.4 [1949] Suspension of rate schedules

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

* * * * *

(b) The Commission can suspend any new schedule making any change in an existing filed rate schedule, including any rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto contained in the filed schedule.

(c) Included in such changes which may be suspended are:

(1) Increases.
(2) Reductions.
(3) Discriminatory changes.
(4) Cancellation or notice of termination.

(5) Changes in classification, service, rule, regulation or contract.

(d) An initial rate schedule cannot be suspended.

(e) Immaterial, unimportant, or routine changes will not be suspended.

(f) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(g) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(h) Suspension of rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

* * * * *

Sec. 2.52 [1949] Suspension of rate schedules

The Commission, in approving and adopting the interpretation stated in § 2.4, applied it also to the suspension of rate schedules under section 4 of the Natural Gas Act.

* * * * *

Sec. 1549.1 [1958 Supp.] Applicability

(a) *Definition.* An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

* * * * *

Sec. 154.92 [1958 Supp.] Filing of Rate Schedules by Independent Producer

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with

the Commission rate schedules, as defined in Section 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

* * * * *

Sec. 154.93 [1958 Supp.] Rate Schedule Defined

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Sec. 154.94 [1958 Supp.] Changes in Rate Schedules

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate

schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in triplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

[Paragraph (b) as amended by Order 202, 23 F.R. 3715, May 29, 1958.]

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (1) the date on which such filing is proposed to be made effective; (2) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classifi-

cation or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

(g) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of the paragraphs (a) to (f) in this section, file a statement showing (1) the approximate annual volume involved; (2) the rate charged therefor; (3) the name of the purchaser; and (4) the geographical location (field, county and State) at which delivery is made.

Sec. 154.95 [1958 Supp., as amended by Order 202, 23 F.R. 3716, May 29, 1958] Oral agreements

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

Sec. 154.96 [1958 Supp.] Filing date

Filing date means the day on which a rate schedule, or a change in rate schedule, is received in the office of the Secretary of the Commission in compliance with the requirements of Sections 154.92 through 154.99.

Sec. 154.97 [1958 Supp.] Cancellation or termination

When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

U.S. GOVERNMENT PRINTING OFFICE: 1960

INDEX

Page

I. Under the Natural Gas Act, as Interpreted in the Mobile Decision, the Commission Improperly Rejected Sun's Initial Rate Schedule and Certificate Filings With Respect to Its 1957 Sales Contract 1

A. Sun's 1947 Gas Sales Contract Represented a Gas Sale Which Was Complete Within Itself .. 5

B. Sun's 1957 Gas Sales Contract Represented a New, Separate and Distinct Gas Sale 10

II. The Certificate Issued With Respect to the 1947 Sales Contract Authorized Only That Sale 21

III. Sun's 1947 Sales Contract Expired by Its Own Terms, Both as a Contract and as a Rate Schedand Its 1957 Sales Contract Did Not Constitute a Change in Rate Schedule 27

Conclusion 34

CITATIONS

Cases:

Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 .....28, 29

Bingler Vacation Tours v. United States, 132 F. Supp. 793 25

Michigan Wisconsin Pipe Line Company v. Panhandle Eastern Pipe Line Company, 226 F. 2d 60 (CA-6), certiorari denied, 350 U.S. 987 32

Gulf Oil Corporation v. F.P.C., 255 F. 2d 556 (CA-5, 1958) 8

Central Kansas Power Co. v. Kansas State Corporation Commission, 316 P. 2d 277 (Kan. Sup. Ct.) 32

Panhandle Eastern Pipe Line Company, 11 F.P.C. 167 25

Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414 .....32, 33

Page

Sunray Mid-Continent Oil Co. v. Federal Power Commission, 239 F. 2d 97 (CA-10), reversed and remanded, 353 U.S. 944 26
Sunray Oil Corporation, 14 F.P.C. 877 26
United Gas Pipe Line Company, 3 F.P.C. 3 25
United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 ..... 23, 27, 28, 33
United Gas Pipe Line Company v. Mobile Gas Service Corp., 350 U.S. 332 ..... 2, 3, 9, 10, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 25, 27, 28, 29
United States v. Seatrain Lines, Inc., 329 U.S. 424 .. 25

STATUTES:

Federal Power Act, 16 U.S.C. 824

Sec. 202 33
Sec. 206 32

Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717 et seq.

Sec. 1(b) 5, 9
Sec. 4 ..... 3, 4, 9, 14, 19, 20, 27
Sec. 4(c) 3, 4, 5, 13, 15, 17, 18, 21, 28, 29
Sec. 4(d) 2, 12, 14, 15, 17, 18, 27, 28, 30, 31
Sec. 4(e) 14, 15, 17, 27
Sec. 5 ..... 4, 19, 20
Sec. 5(a) 32, 33
Sec. 7 ..... 3, 4, 9, 19, 20, 22
Sec. 7(b) 6, 14, 24
Sec. 7(c) 3, 4, 6, 16, 17, 23, 24
Sec. 7(e) 4, 6, 13, 16, 23, 29
Sec. 7(g) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 321

SUN OIL COMPANY, *Petitioner,*

vs.

FEDERAL POWER COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER, SUN OIL COMPANY

Petitioner, Sun Oil Company (Sun), submits the following Reply to the brief filed herein for the Federal Power Commission (Commission).

I.

UNDER THE NATURAL GAS ACT, AS INTERPRETED IN THE MOBILE DECISION, THE COMMISSION IMPROPERLY REJECTED SUN'S INITIAL RATE SCHEDULE AND CERTIFICATE FILINGS WITH RESPECT TO ITS 1957 SALES CONTRACT

The Commission's brief persistently uses such catch-phrases as "service" and "continuing service" which, by their constant repetition, tend to obscure the basic issue involved here, which is: Whether in the circumstances of this case the expiration of Sun's 1947 gas sales contract, by its own expressed terms, shall control the proper disposition of the rate

schedule and certificate applicable to that sale and, likewise, the initial rate schedule and certificate application filed with respect to Sun's 1957 gas sales contract. In this Reply Brief we shall seek to restore the basic issue to its proper perspective.

In *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, a case involving a strikingly parallel position taken by the Commission before this Court, the Commission in its brief,[1] using a similar technique, repeatedly employed the catch-phrase, "filed rate procedure," which there tended to obscure the fact that the procedure thus asserted involved in reality a complete departure from the price provisions of the gas sales contract in a way the Court determined was not intended by Congress. The Court in *Mobile* rejected the catch-phrase, and all that it stood for in the Commission's brief, and refused to allow such phrasing to obscure the Court's conclusion that the contract terms should control, in a proceeding initiated under Section 4(d) of the Natural Gas Act.[2]

We submit that, no matter how extensively the issue may be clouded by the semantics of the brief writer, the issue here is in substance no different from the issue decided by the Court in *Mobile*. Here, as in *Mobile*, the issue revolves around the degree of sanctity which is to be accorded the private sales contract in

---

[1] Filed in No. 31, October term, 1955, styled *Federal Power Commission, Petitioner* v. *Mobile Gas Service Corporation*.

[2] In *Mobile*, the heart of the Court's decision is contained in the statement, 350 U.S. at 338: "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. • • •"

the regulatory structure created by Congress in the Natural Gas Act. And here, as in *Mobile*, the effect of the Act is such that the contract clearly should control. In *Mobile*, despite all of the Commission's protestations in favor of its authority to ignore the price provisions of a gas sales contract under Section 4 of the Act in the interest of a "filed rate" procedure," the Court's decision compelled the Commission to respect the terms of the contract. Likewise here, despite all of the Commission's protestations in favor of its authority to enforce a "continuing service," the Natural Gas Act can and should be interpreted as requiring that the terms of the contract be respected. In *Mobile* the contract terms involved were those relating to price, or rate. Here the contract terms involved are basically those of Sun's 1947 gas sales contract relating to the duration of the sale. In the posture of this case the contract terms relating to the duration of the sale are entitled to the same treatment and respect as those in *Mobile* relating to the price or rate at which the gas is sold. In substance, the issue is the same, and thus the conclusion should be the same.

In this section of our Reply Brief we shall speak generally of both the rate schedule provisions of Section 4 of the Act and the certificate provisions of Section 7 of the Act. It is apparent that the two sections have the same scope, so that any "transportation or sale" of gas requiring the filing of a rate schedule under Section 4(c) of the Act likewise requires the filing of a certificate application under Section 7(c) of the Act. By the same token, since essentially the same jurisdictional phrasing is used in both sections, any determination of the extent or duration of

the jurisdictional act which is the subject of Section 4(e) should likewise determine the extent or duration of the same act within the meaning of Sections 7(c) and (e). All such determinations are basically governed by the jurisdictional provision of Section 1(b) of the Act.[3]

---

[3] Curiously, the Commission argues (FPC Br. 14) that the determination of whether Sun's 1957 sales contract constitutes a "change" in the rate schedule comprising the 1947 sales contract is not dependent on the duration of the certificate covering the earlier sale. It is obvious that if it is determined that the certificate covering the earlier sale expired with the expiration of the sales contract, because the certificate covering the sale coincided in duration with the duration of the sale, it naturally follows that the rate schedule applicable to the same sale must also expire with the expiration of the sale, thus leaving nothing which can be the subject of a "change." This is particularly true because the term "sale" can only have one meaning where used in Section 4(e) and in Sections 7(c) and (e) of the Act. And this is true whether Sun's 1947 sales contract represents a "sale," as we contend, or represents a "service," as the Commission contends throughout its brief by constant repetition of the term, because in either event Sun's jurisdictional act, whatever it may be styled, is limited in duration to the duration of its contract. However, it should also be noted that if there were any validity to the Commission's general contention that the determination of the status of the jurisdictional act under Section 4 is not dependent upon its status under Section 7, then it follows that the corollary of the Commission's assumption is even more clearly true—and that is that even if the certificate issued to Sun in 1956 were somehow construed as granting authorization in advance for all gas sales which might be made from the Gwinville Field during the life of the field, nevertheless each separate and distinct sale represented by a distinct sales contract (whether denominated as a "sale" or a "service") becomes the subject of an initial rate schedule within the meaning of Section 4(e) of the Natural Gas Act. Thus, the status of Sun's 1957 sales contract as an initial rate schedule under Section 4(e) of the Act is not necessarily dependent upon the duration of the certificate issued to Sun in 1956. We note further that the foregoing interpretation does not deprive the Commission of its overriding review authority under Section 5 of the Act, which authority was plainly not exercised in the circumstances of this case.

A. Sun's 1947 Gas Sales Contract Represented a Gas Sale Which Was Complete Within Itself

We emphasize the Commission's repeated use of the catch-word "service" throughout its brief because we believe that therein lies the basic error which permeates the entire brief. We shall note and discuss the basic error at some length. First, however, we should make clear that we most emphatically do not agree that under the terms of its 1947 gas sales contract Sun had covenanted to perform a "service," as distinguished from a "sale." The word "service" obviously has very little precise meaning within itself, contrary to the Commission's apparent view, and can only be properly viewed, for the purposes of this case, within the context of the Natural Gas Act. Viewed in that context, Sun's 1947 gas sales contract was not an agreement for the performance of a "service," but only an agreement by a gas producer to sell and deliver gas, a commodity, in certain determinable quantities and for a fixed term of years.

The basic jurisdictional provisions of Section 1(b) of the Act apply the entire body of the Act, in the circumstances specified therein, to either the "transportation" or the "sale" of gas. Nowhere does Section 1(b) or any other provision of the Act state, or even imply, that the word "service" shall be regarded as a generic term encompassing *all* of the acts of *all* natural-gas companies which are subject to the Commission's jurisdiction under Section 1(b) of the Act (FPC Br. 17). Certainly Section 4(e) does not lead logically to such a conclusion (FPC Br. 16), because the term "such * * * services," as used there, is most likely a reference to the antecedents "practices and regulations" in that section, and not to the expression

"any transportation or sale." In Section 7(b) of the Act the term "service" is used without any hint of a definition, except that the term as there used is obviously limited in scope to a jurisdictional act performed through jurisdictional "facilities." Similarly, the use of the term "service," in Sections 7(c) and (g) of the Act, proves nothing with respect to the all-inclusive generic nature of the term contended for by the Commission. On the other hand, it is clear from Section 7(c) that the term "service" does not generically include all gas sales—and, indeed, may not include *any* gas sale—since that section provides for the issuance of a certificate "* * * authorizing the whole or any part of the operation, *sale*, *service*, construction, extension, *or* acquisition covered by the application * * *."[4] To say the least, the disjunctive use of the terms "sale" and "service" is a positive showing that the term "service" does not include all sales, and it is a strong indication that the terms are mutually exclusive. The use of the term "service" in the succeeding clause of Section 7(c) is not revealing, because that clause simply means that the Commission must find that the applicant is able and willing to do *whatever* acts and perform *whatever* service may have been proposed.

The foregoing analysis is, of course, not completely satisfying as to the precise meaning of the term "service," as used in the Act. But there is no doubt that it does not have the generic connotation ascribed to it by the Commission (FPC Br. 17). And hence, in any event, the 1947 gas sales contract entered into by Sun was not an agreement to perform a "service,"

---

[4] All emphasis is supplied in this Reply Brief, unless otherwise indicated.

within the meaning of the Act, but was rather an agreement to sell gas, a commodity.

After having first asserted the premise (FPC Br. 17) that *any* sale of gas constitutes a "service" within the meaning of the Act, the Commission then proceeds at great length (FPC Br. 18-25) to argue that Sun's 1947 gas sales contract was *in fact* a "service" agreement rather than a sales agreement. The latter argument would, of course, hardly be necessary if the Commission were convinced of the validity of its first premise. Moreover, the argument consists essentially of a bootstraps operation which, on close scrutiny, amounts to no more than an assertion by the Commission that Sun's 1947 contract was a service agreement because it was a service agreement.[5] Actually, Sun's 1947 gas sales contract (R. 32) was not essentially different in form or scope from hundreds of producers' gas sales contracts which have been filed with the Commission since it assumed jurisdiction over producers in 1954. The rather elaborate provisions for quantities of gas to be sold and delivered, as to which the Commission seeks to make so much (FPC Br. 18-19), were

[5] For example, the brief states with reference to Sun's 1947 contract (FPC Br. 18-19): that "* * * it goes to considerable pains to define the *service* to be rendered and to state the seller's obligations and buyer's rights in terms which show that readiness to serve is an important element. * * * Contract language could scarcely be plainer than the 'daily take' provision that a continuing *service* was to be provided * * *. That the 1947 contract was not solely a sale of gas, but was rather an agreement to enter upon a *service*, is also shown by the fact that the agreement did not transfer or purport to transfer title to any of Sun's gas to Southern. * * *" In truth, the contract thus described does not employ the terminology credited to it by the Commission. The net effect of this and like discussion in the Commission's brief is that the 1947 contract is a service agreement only because the Commission wishes it so treated.

not unusual, but rather were typical of other producers' sales of the same magnitude. In fact, rather than illustrating an open-end "service" agreement, as the Commission asserts, the quantity provisions of the 1947 contract clearly demonstrate that the quantities were ultimately to be fixed according to certain specified conditions existing during the term of the contract. These and the other provisions of the contract referred to by the Commission are no more than typical of the gas sales contracts which have been and are constantly being entered into by producers of gas. Sun's 1947 gas sales contract was typical of all those to which the Court of Appeals for the Fifth Circuit made reference, in *Gulf Oil Corporation* v. *F.P.C.*, 255 F. 2d 556, 557 (C.A. 5-1958), when it pointed out that independent producers of gas "* * * are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a *service* to the public." This is especially true of Sun's 1947 gas sales contract, which was entered into as a good faith sale of a commodity long before either Sun or its purchaser or the Commission itself seriously believed that the Commission had regulatory authority over the transaction, and which was thus deliberately entered into under the conditions of the market place and not under utility concepts of any kind.

In the light of the nature of the contract, as later affected by the Natural Gas Act, if Sun's 1947 gas sales contract did not represent a "sale" of gas within the meaning of the Act, but rather represented an agreement for a "service," as asserted by the Commission, then there can be no "sale" of gas within the meaning of the Act. We submit that there can be no transaction with respect to gas which can more

properly or fundamentally be designated as a "sale" of gas within the meaning of the Act than the transaction represented by Sun's 1947 gas sales contract. The entire contract is premised on the selling of gas by Sun and the purchasing of gas by Southern, and in 1947, when the contract was entered into, the parties could obviously not even have had in mind the vague service concepts suggested by the Commission's brief at this late date. We submit that if the Commission's present interpretation of the transaction were allowed to stand, much of the basic jurisdictional language of the Natural Gas Act will have been reduced to hollow, meaningless phrases. This is so because if Sun's 1947 contract does not represent a "sale" of gas, there is no way to accomplish a "sale" of gas, as distinguished from a "service" with respect to gas. Yet the entire jurisdictional predicate of the Act, as expressed in Sections 1(b), 4 and 7, is founded on either the "sale" or the "transportation" of gas. Surely Congress intended for those words to have meaning unto themselves; otherwise, Congress would have expressed the jurisdictional basis entirely in terms of the broad service concept which the Commission now seeks to have written into the Act.

The Court's decision in *Mobile* likewise makes clear the status of Sun's 1947 contract as representing a jurisdictional "sale" rather than a "service." In the light of *Mobile* (350 U.S. at 338) the Act evinces no purpose to abrogate private rate contracts as such. In *Mobile* the Commission sought to install a "filed rate procedure" concept which would have been superior to the terms of the private contract with respect to rates, but the Court rejected the suggested concept and held that the rates would be governed by

the private contract, subject to the Commission's review powers. Here, similarly, the Commission seeks to install a "service" concept which would be superior to the terms of the private contract with respect to the nature of the transaction contemplated by the contract—an agreement to sell and purchase gas. The philosophy of the Act, as expressed in the *Mobile* decision, compels the conclusion that the terms of the private contract govern the nature of the transaction within the meaning of the Act. In this light, the 1947 contract, clearly being an agreement by Sun only to sell gas, represented only a "sale" within the meaning of the Act, and not a "service."

Representing a *sale* of gas, Sun's 1947 contract, as we have pointed out at length in Sun's main Brief, governed the duration of the rate schedule applicable to the sale and likewise governed the duration of the certificate issued by the Commission in 1956 authorizing the sale. Since that rate schedule and that certificate expired upon the expiration of the sale under the terms of the 1947 contract, the 1957 gas sales contract, representing an entirely new, separate and distinct sale, could only be the basis for a new initial rate schedule and a new certificate.

B. Sun's 1957 Gas Sales Contract Represented a New, Separate and Distinct Gas Sale

There is a still more fundamental error in the Commission's brief. Throughout the brief, but somewhat clouded by the intricacies of the phrasing, there is constantly repeated the theme, which is in reality a bare assertion without support, that once having embarked upon the sale of gas represented by its 1947 gas sales contract, Sun could not withdraw from the further performance of such sale without Commis-

sion approval, even after the effective term of the sale had expired, and initiate a new, unrelated sale.

The theme is played in the Commission's brief, however, not by the use of the phrasing just stated above, but by first designating Sun's jurisdictional act performed under its 1947 contract as the performance of a "service" (rather than a sale), and then by gradually but repeatedly referring to the act as encompassing an obligation to perform a "*continuing* service," even after the expiration of the term of the contract, or, in the alternative, by referring to the act undertaken by Sun in its 1957 contract (R. 61) as constituting the "*same* service" as was covered by its 1947 contract.[6] The Commission's theme includes the proposition that after the expiration of the 1947 "service" contract, Sun was not empowered to initiate

---

[6] Examples appear in the Commission's brief as follows:

"[Sun's contract is] • • • an agreement for the performance of a *supply service* which, once started, is the subject of continuing rate regulation and *may continue* independently of the parties' contract" (FPC Br. 15).

"• • • This makes doubly clear that, when Congress speaks of a sale or transportation, it is not referring to a single, isolated, individual, or unique event, nor simply to a legal relationship, but to a continuing process of selling or transporting—not to the sale or transportation of an identified 'batch of gas', but to a *continuing service*" (FPC Br. 16).

"• • • it makes no difference to the Commission's authority that the old contract • • • has expired and a new one • • • has been made—at least so long as the new contract envisages continuity of the *same service* performed in the past" (FPC Br. 20).

"• • • These factors demonstrate that the 1957 contract on its face called for a continuation of the *same jurisdictional service* as that rendered under the 1947 contract" (FPC Br. 23).

a new, unrelated "service" in the same field and with the same purchaser, but could only proceed to "change" the first "service" contract under Section 4(d) of the Act. There is in reality no support for such statements, either in the language of the Natural Gas Act or in the cases which have construed the Act. The statements rest on the mere assumption of the Commission, and no amount of repetition should be permitted to make them valid.

We are referring here to the gap which the Commission hurdles in moving from the premise of "service" to the conclusion of "continuing service" (with reference to Sun's obligation) or "same service" (with reference to Sun's 1957 contract). Even if we assume *arguendo* that the act performed by Sun under its 1947 contract somehow constituted a "service"—which we have shown is not correct—there is no authority, in the Natural Gas Act or elsewhere, for the proposition that the undertaking of such a service imposed an obligation to continue the service after the effective term of the contract which created it, or that Sun was not empowered to initiate a new, unrelated service upon the expiration of the first service contract. In other words, the Commission's assumption that the 1947 contract generated a "service" still leaves open the more fundamental question in this case—What was the term or duration of that "service"? Nor is there authority for the proposition that the act undertaken by Sun in its 1957 contract constituted the same service as was created by the 1947 contract. On the contrary, the impact of the *Mobile* decision, as we shall show, clearly invalidates the conclusions drawn by the Commission.

The conclusions drawn by the Commission are equally invalid whether the act undertaken by Sun in

its 1947 contract be called a "sale" or a "service." However, it is apparent that the Commission has recognized that if the act be called a "sale"—as it plainly was—then there is obviously no basis for an assertion that the later separate and distinct sale accomplished under the 1957 contract constituted a "change" in the rate schedule consisting of the 1947 contract within the meaning of Section 4(e) of the Act, since the first sale and rate schedule expired with the expiration of the contract and was not in existence to be changed. And similarly, the Commission seems to have recognized that if the 1947 contract be deemed to have effected a "sale"—as it plainly did—then the certificate which was issued in 1956 to cover such sale, under the authority of Section 7(e) of the Act, was only effective for the duration of the sale and automatically expired by its own terms upon the expiration of the sales contract. By asserting that the act undertaken by Sun in its 1947 contract must be designated as a "service," the Commission seeks to imply into the Natural Gas Act an obligation for a "continuing service" and seeks to imply into Sun's 1957 contract an identity with the first contract which will constitute the 1957 contract the "same service." However, in either event, whether "sale" or "service" be used, the basic issue in this case must ultimately be governed by the terms of the contracts, as was held in *Mobile*, and on such basis the Commission's orders involved here are invalid.

It should be made clear at this point that for purposes of this case we do not quarrel with the proposition that if Sun's act under its 1947 contract be deemed to constitute a service, there may have been an obligation looking to continuity of service during the effec-

tive term of the service so undertaken. In practical language, this would mean (FPC Br. 28-31) that during the term of Sun's 1947 contract any adjustment in rate provided in the contract or any agreed amendment of the contract would have constituted a "change" in rate schedule subject to the provisions of Sections 4(d) and (e) of the Act.[7] Our assumption for purposes of this case would also mean that during the term of Sun's 1947 contract any proposed discontinuance of "service" might have been subject to the provisions of Section 7(b) of the Act, since the "service" for the entire term of the 1947 contract had been certificated.

Our point is that, even if Sun's 1947 contract be deemed to have effected a "service," the "service" thus undertaken—as well as the "sale" thus undertaken, if the agreement be deemed an agreement to sell—came to a complete and final end upon the expiration of the contract which created it. The 1947 contract was the only conceivable thing which created or gave rise to the "service" of which the Commission seeks to make so much in its brief. In *Mobile* the Court has made clear that the contract, in circum-

[7] The Court below (R. 150), after citing two cases relating to the proposition set out in the text above, then stated that "it necessarily follows" that Sun's 1957 contract is a rate "change" under Section 4 of the Act. We have shown in Sun's main Brief (Sun Br. 43) that the Court's conclusion does not follow from the authorities cited, "necessarily" or otherwise. Judge Brown, in his dissenting opinion (R. 156), also emphasizes the same point. The Commission's entire brief is in reality a lengthy embellishment of the statement of the Court below that the conclusion "necessarily follows" from the premise. But in both the Commission's brief and the opinion of the Court below there is a marked absence of support for the conclusion. In truth, the conclusion is in conflict with the Natural Gas Act and this Court's *Mobile* decision, as we point out in the text.

stances like ours, is the basis for regulation. Hence, in the very nature of the Natural Gas Act, the "service" (or sale) entered upon under the 1947 contract could only endure during the life of that contract as expressly provided therein, and the "service" thus terminated, without more, upon the termination of the contract which created or gave rise to it.

Again in practical language, this means that the rate schedule comprising the 1947 contract and applicable to the "service" (or sale) undertaken by Sun under the contract, terminated and came to a complete end by its own terms upon the expiration of the 1947 contract, in accordance with Section 4(c) of the Act. The 1957 contract, submitted by Sun as a new initial rate schedule, could only be a separate initial rate schedule under Section 4(c). It could not be a "change" in the earlier rate schedule, under Section 4(d) of the Act, because the earlier rate schedule was no longer in existence to provide the subject of a "change." By the same token, the 1957 contract could not be for the "same service" (or sale) as the 1947 contract—and thus a mere "change" in the rate schedule consisting of the 1947 contract, as the Commission contends—because the earlier contract no longer existed, there was no reference or identity whatsoever between the two contracts, each was complete unto itself, the earlier contract did not even anticipate or contemplate a further contract, and there was a vast difference in the terms of the two contracts.[8] And

[8] The weakness of the Commission's argument that the 1957 contract was for the "same service" as the 1947 contract, and thus a mere "change," is plainly revealed by the Commission's statement (FPC Br. 25) that, "* * * Whether or not a contract has instituted a new service justifying an initial rate filing must depend on the facts of the particular case, and it would be difficult to

finally, our position means that the certificate issued by the Commission in 1956 authorizing the "service" (or sale) undertaken by Sun under the 1947 contract, terminated and came to a complete end by its own terms upon the expiration of the 1947 contract, in accordance with Sections 7(c) and (e) of the Act, because the only "service" (or sale) authorized by the certificate was that set forth in the contract which was incorporated in the application. The certificate could not have authorized more, since it was not then possible for Sun to show under Section 7(c) that it was "able and willing" to perform any more extensive a "service" (or sale), without a contract or a purchaser then available beyond the term of the 1947 contract.

The Commission's brief, in moving rapidly (and repeatedly) from the premise of "service" to the conclusion of "continuing service," clearly begs the principal issue in this case. The situation and the position taken by the Commission here are remarkably

---

adopt a hard and fast rule. For this reason, we need contend no more than that on the facts of this case—where there has been no change in the physical facilities, source of the gas, or the buyer—the Commission and the Court below were entirely correct in concluding that the same service, in a jurisdictional sense, was continued by the second contract • • •." Assuming that this determination involves a question of fact, as the Commission states it is incredible that the mere fact that the second contract caused a sale of gas to the same buyer from the same field should constitute the second contract one for the "same service." This is not a determination of fact; it is rather the assumption of a preconceived result. Even more important, the Commission's statement wholly ignores the controlling impact of the Court's decision in *Mobile*, which requires such a determination to be made according to the nature of the *contracts* involved. Since the 1947 and 1957 contracts were entirely unrelated, and particularly because the 1947 contract contained a fixed term and did not anticipate the later contract, the two contracts could not have been for the "same service." In the light of *Mobile*, this is clear.

comparable to the situation and the position taken by the Commission in the *Mobile* case. In *Mobile* the Commission argued (350 U.S. at 340) that under the "filed rate procedure" of Section 4(d) of the Act natural-gas companies could initiate rate changes, and the Commission's only power is to set aside a new rate, under Section 4(e), if the new rate is found to be unlawful. The Court answered:

> "The major defect of this argument is that it assumes the answer to the very question in issue —whether natural gas companies are empowered to 'initiate' unilateral contract changes under § 4(d). That the so-called 'filed-rate' procedure is applicable to changes in contracts as well as other rates proves only that contracts may be changed, not that they may be changed unilaterally. * * *" (350 U.S. at 340).

In our case the Commission argues, in effect, that Sun's 1947 contract effected a "service" and that Sun's 1957 contract therefore effected no more than a "continuing service" which is a "change" within the meaning of Section 4(d) of the Act and a continuing part of the service authorized by the certificate issued in 1956. The Court's answer in *Mobile* can very aptly be paraphrased to fit the present Commission argument, as follows:

> The major defect of this argument is that it assumes the answer to the very question in issue —whether Sun is empowered, under Sections 4(e) and 7(e), to initiate a new, separate service (or sale) by contract upon the expiration under its own terms of an earlier service (or sale) contract which in no way anticipated or contemplated a further service (or sale). That the so-called "continuing service" procedure under Section 4(d) is applicable to changes in contracts which otherwise

continue in effect proves only that such continuing contracts may be changed, not that a "change" is accomplished under Section 4(d) when the first contract expires under its own terms and a new, separate and unrelated contract, not anticipated or contemplated in the first contract, is entered into.

In the light of the preceding statement of the issue, it is significant that the Court in *Mobile* first noted that:

> "* * * On its face, however, § 4(d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4(c) purports to define what constitutes a 'contract' that may be filed with the Commission. * * *" (350 U.S. at 339).

Then, in response to that problem, the Court held that:

> "* * * These sections are simply parts of a *single statutory scheme* under which all rates are *established initially* by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. * * *" (350 U.S. at 341).
>
> * * * * *
>
> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates *set initially* by natural gas companies, and there is nothing to indicate that they were intended to do more. * * * The obvious implication is that, except as specifically limited by the Act, the *rate-making powers* of natural gas companies were to be no different from those they would possess in the absence of the Act: * * *." (350 U.S. at 343).[9]

[9] We recognize also the Court's comment (350 U.S. at 341) to the effect that its holding that contracts, where *ex parte* rates are not involved, are the basis for the regulatory scheme of the

We submit that the scope of the Court's opinion and conclusion in *Mobile* obviously has as much application to Section 7 of the Act as it does to Sections 4 and 5 of the Act. With respect to all of those sections, it is apparent that the status of the contracts subject to Commission jurisdiction is to be determined, not according to whether they provide for or effect a formal classification of "sale" or "service," but rather according to the essential provisions of the contracts relating to the transactions reflected by the contracts and according to *basic contract principles*, however such transactions may be formally styled. Moreover, the status of a contract subject to Commission jurisdiction, whether it constitutes a rate schedule or the basis for a certificate application, may not be determined by the Commission in its uncontrolled discretion, as in truth the Commission seeks to do here after the event, but may only be determined in accordance with the terms of the contract itself, on the basis of fundamental contract principles.

Judging Sun's 1947 and 1957 contracts in accordance with the doctrine of *Mobile*, and thus as *contracts*, it is folly to contend that one was a mere "change" in or "continuation" of the other. Long before the advent of Commission regulation of gas producers, and in the utmost good faith, Sun and its purchaser entered into the 1947 contract for the sale and purchase of gas, the contract containing provisions for a fixed term and for specifically determinable quantities. Upon full and complete performance by Sun, the contract

---

Act does not impair the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. However, the Commission did not seek to exercise any such paramount power in the circumstances of this case.

expired by its own terms in 1957. Viewed, not as a "single unique event" (FPC Br. 15), but *as a contract* for a term of years, as the *Mobile* doctrine would have us view it, the 1947 contract had terminated in 1957 and ceased to exist. The 1947 contract provisions did not anticipate or contemplate in any way any further or additional sale, service, or other transaction between the parties. When the 1957 contract was entered into, to take effect after the expiration of the earlier contract, no reference was made to the earlier contract. The 1957 contract was a completely new, independent, unrelated and self-sustaining sale and purchase agreement. In no way was it constituted as a "change" in or "continuation" of the earlier contract. Viewed *as a contract*, as the *Mobile* doctrine would have us view it, the 1957 contract could not conceivably be regarded as having any such relationship to the earlier contract. Nor could the fact that Sun chose to negotiate and deal with the same purchaser and to deliver gas under the new contract from the same field (FPC Br. 25) conceivably create any such relationship. On the face of the two contracts, they are entirely independent and unrelated and, in fact, were so conceived and treated.

Since the Natural Gas Act contains a "single statutory scheme" (350 U.S. at 341) under which rates are established initially by natural gas companies *by contract*, if they choose to do so, Sun's 1947 and 1957 contracts, with respect to all matters at issue here, had the same status under Sections 4 and 7 of the Act as they had *as contracts*.[10] Hence, the 1947 contract as a rate

[10] Again, we recognize that the Commission has certain overriding powers with respect to contracts, particularly under Section 5 of the Act, but no exercise of any such overriding power is involved in the circumstances of this case.

schedule, filed under Section 4(e) of the Act, expired and ceased to exist at the same time it expired *as a contract*. Similarly, since the 1957 contract was wholly unrelated to the 1947 contract, the later contract was properly submitted to the Commission for filing under Section 4(e) of the Act as an initial rate schedule. Viewed *as a contract*, it could not properly be treated as a mere "change" in the earlier contract, whether the earlier contract be regarded as a contract or as a rate schedule. And finally, the certificate issued by the Commission in 1956, authorizing the specific transaction or act represented by Sun's 1947 contract, whether it be regarded as providing for a sale or a service, had the same term as did the contract. Thus, the certificate expired and ceased to exist at the same time the act it authorized expired *as a contract*. The act represented by the 1957 contract was, then, properly the basis for a new and independent certificate application.

We submit that in the light of the Natural Gas Act, particularly as interpreted by the Court's *Mobile* decision, the Commission erred in rejecting Sun's initial rate schedule filing and its certificate application applicable to its 1957 contract.

II.

THE CERTIFICATE ISSUED WITH RESPECT TO THE 1947 SALES CONTRACT AUTHORIZED ONLY THAT SALE

What has been said in Sun's main Brief, together with the discussion contained in the preceding section of this Reply Brief, dispose of the principal arguments advanced by the Commission. However, there are some subsidiary points which we desire to comment upon, and these will be considered as they

concern certain parts of the Natural Gas Act. This section of our Reply Brief relates to matters involving Section 7 of the Act.

In Sun's main Brief (Sun Br. 16-38) we have established that Sun, upon the advent of Commission regulation of gas producers, sought only a certificate authorizing the sale of gas covered by its 1947 gas sales contract for the remaining term of that contract, and that Sun in 1956 was issued a certificate which authorized only that sale as described in Sun's application. We have also established that such a certificate constituted the limit of the Commission's authority under the circumstances. Hence, the certificate issued in 1956 expired with the expiration of Sun's 1947 contract, and Sun's application for a certificate applicable to its 1957 gas sales contract could not lawfully be rejected by the Commission.

The main thrust of the Commission's response (FPC Br. 40-44) is directed at an attempt to rationalize the Commission's 1956 certificate, long after the event, as having variously authorized a "service" (FPC Br. 41) or "separate acts of selling gas" (FPC Br. 43). The Commission (FPC Br. 42) arbitrarily concludes from that rationalization that "* * * the Commission did not authorize sales or service by Sun only for the remainder of the contract term. * * *" As we show in the preceding section of this Reply Brief, the conclusion begs the question. Whether the act undertaken by Sun in its 1947 contract be characterized as a "sale" or a "service" or a "series of sales," the fact still remains that the *contract* determines the duration of the act undertaken by Sun. The act undertaken by Sun in its 1947 contract was the basis, and the only basis, for its application for a certificate (Sun Br. 18

23). Moreover, the application was granted, without qualification or condition, and the act undertaken by Sun in its 1947 contract thus became the act authorized by the certificate issued by the Commission, including the duration of the act (Sun Br. 23-38). This result is in keeping with the "single statutory scheme" of the Natural Gas Act, especially as explained in the *Mobile* decision (350 U.S. at 341).[11] More particularly, this result is in keeping with Sections 7(c) and (e) of the Act, as we show in the preceding section of this Reply Brief and in Sun's main Brief.

It contributes nothing to the issue to point out (FPC Br. 41-42) that in two places the Commission's 1956 order issuing the certificate used the term "service." For the certificate was completely clear in authorizing the act for which authority was requested in Sun's application (Sun Br. 23-31), and the application was likewise completely clear in requesting only authority to complete the act undertaken in Sun's 1947 contract (Sun Br. 18-23). Although the contract represented a sale within the meaning of the Natural Gas Act, as we have shown, the result is the same even if the contract be regarded as representing a "service" or a "series of sales." In any event, the scope of Sun's application, and hence the scope of the Commission's certificate, were, by their very nature, limited in duration to the duration of the 1947 contract which represented the sole basis for both the application and the certificate.[12]

---

[11] See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

[12] One point may be set at rest here. The Commission (FPC Br. 22) has quoted what it calls a "concession" from Sun's Brief in the Court below. The quotation is not in context. In the

Similarly, it contributes nothing to the issue here to point out (FPC Br. 43) that, "* * * If Sun had in fact desired a certificate limited in duration to the period of the 1947 contract of sale it would have been simple to say so explicitly; but it did not. * * *" The fallacy in this statement is that Sun sought precisely what Section 7(c) of the Act requires—a certificate authorizing the very sale it had undertaken by its 1947 contract—no more and no less. Sun's application was, of necessity, limited to the contract, and the certificate thereafter issued by the Commission was, of necessity, limited to the "* * * sale by Applicant of natural gas * * * as more fully described in the application and exhibits * * *" (R. 110). Nothing more was either required or permitted by law, since Section 7(e) of the Act requires that the certificate "* * * shall be issued * * * authorizing the whole or any part of the * * * sale * * *." A certificate purporting to authorize a perpetual sale or service would have been, in the circumstances of this case, the "conditional" certificate; yet the Commission neither specified nor even implied such a condition in the certificate actually issued, assuming *arguendo* that it had the power to do so.

By the same token, Sun's statement in its application (R. 26) that it sought a certificate "* * * to authorize the continued sales by Sun of its gas" had direct

---

earlier stages of this controversy the Commission had variously argued, among other things, both the "continuing service" doctrine and the applicability of Section 7(b) of the Act. The language now quoted, along with other language not quoted, was designed to show that there could be no abandonment, as argued by the Commission in one phase, if the 1957 contract represents a continuing service, as argued by the Commission in another phase. If there is truly any doubt on the Commission's part, we do not concede that the 1957 contract represents a *continuation* of either service or sale.

reference to its contract with Southern Natural Gas Company (R. 28), and was entirely consistent with this concluding statement in the application (R. 29): "* * * This application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described. * * *" The inference which the Commission seeks to draw (FPC Br. 44) from the statement first quoted is simply untenable.

The statements made and cases cited by the Commission (FPC Br. 44-47) with respect to its "prior interpretations and practices" are not relevant in the circumstances of this case. In the first place, we assert (Sun Br. 23) that by the very language of the order issued in 1956 Sun was granted a certificate limited to the duration of its 1947 sales contract. The term of such a certificate must be determined from the language of the certificate itself, not from any consideration of the subjective intent of the Commission or its disposition of other cases not involving Sun. *Cf. United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 426-9; *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793, 796. Moreover, the matters at issue in this case were not developed in the decisions of the Commission which it now cites in its brief. In addition, those decisions antedated the decision of this Court in *Mobile*, while the order granting a certificate to Sun was issued by the Commission after the *Mobile* decision. In the *Panhandle Eastern* case cited by the Commission (11 F.P.C. 167, 172; FPC Br. 45) it is apparent that the Commission had earlier issued a pipeline certificate which specifically contemplated a continuing pipeline service and was accepted by the pipeline on that basis. In the *United Gas* case (3 F.P.C.

3, 5; FPC Br. 46), the contract involved was not for a fixed term, and thus the case is not at all in point here. Likewise, the *Sunray Oil Corporation* case (14 F.P.C. 877; FPC Br. 45) is irrelevant because the Commission's decision there was based entirely on a matter of statutory interpretation, not Commission intent or discretion, and the interpretation was rejected on appeal. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (CA-10), reversed and remanded, 353 U.S. 944. It is also significant that all of the instances cited by the Commission (FPC Br. 46-47) of its having fixed expressly the terms of limited certificates, involved pipeline proposals to construct facilities and operate them for fixed periods. The usual pipeline certificate applications to construct and operate facilities and make sales by means of such facilities contemplate operations of unlimited duration, the true "continuing service" of which the Commission speaks so much. Hence, the instances cited by the Commission are exceptions to the general rule and involve special pipeline situations. The Commission's practice in such instances has no application or relevance to sales of gas by independent producers and no significance with respect to this case. In any event, the fact that the Commission has had occasion to express time limits in some certificates would not be controlling since, as we have pointed out above, the duration of Sun's certificate must be determined from the language of the certificate itself.

III.

SUN'S 1947 SALES CONTRACT EXPIRED BY ITS OWN TERMS, BOTH AS A CONTRACT AND AS A RATE SCHEDULE, AND ITS 1957 SALES CONTRACT DID NOT CONSTITUTE A CHANGE IN RATE SCHEDULE

There are additional subsidiary points in the Commission's brief which we desire to comment upon, and this section of our Reply Brief relates to those involving Section 4 of the Act.

The Commission (FPC Br. 33-40) has completely misconceived our point with respect to the effect on this case of the Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and the Court's further decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. The Commission's misconception is typified by the Commission's statement that, "* * * *Mobile* recognized the Commission's authority to review any *contracted* change in a contracted rate or service, and to suspend the change pending hearing, as provided for in Section 4(e) * * *" (FPC Br. 34—emphasis by the Commission); and its further statement that, "* * * in *Memphis*, the entire Court accepted the principle that agreed-upon changes in rates could be filed pursuant to Section 4(d) * * *. That, of course, is precisely the situation in this case" (FPC Br. 36).

The Commission's misconception of the effect of *Mobile* and *Memphis* is this: We do not question that the Court held that agreed-upon *changes* in rates must be filed under Section 4(d). Nor do we question that Sun's rate in its 1947 contract and its rate in its 1957 contract were *agreed-upon* rates. Our point, which is not recognized at all by the Commission's brief, is and has been that whether an agreed-upon rate is a

change within the meaning of Section 4(d) or an *initial rate* within the meaning of Section 4(e) must itself be determined by reference to the contract which creates the rate. That is as much a part of the meaning of *Mobile* and *Memphis* as is the principle the Commission attributes to those decisions. In our case it is not enough to say that agreed-upon changes must be filed under Section 4(d). We do not quarrel with that point. But stopping there evades the issue. For that statement leaves entirely open the question—What is a *change* under Section 4(d) and what is an *initial rate* under Section 4(e)? *Mobile* and *Memphis* require not only that the determination of whether a rate is *agreed-upon* be reached in accordance with the terms of the contract, but also that the determination of whether an agreed-upon rate is an *initial rate* or a *change* in rate be reached in accordance with the terms of the contract. That is part of the "single statutory scheme" of the Natural Gas Act (350 U.S. at 341).

As we have shown, there is no doubt, in the light of *Mobile* and *Memphis*, that the rate provided in Sun's 1957 contract is an initial rate and that the 1957 contract constitutes an initial rate schedule within the meaning of Section 4(e) of the Act. Conversely, the 1957 contract is not a change within the meaning of Section 4(d). The 1947 contract had come to a complete end by performance and had ceased to exist when the 1957 contract became effective. There was then no contract or rate schedule in existence to change. The 1957 contract was complete, independent and unrelated. It could only be an initial rate schedule under Section 4(e) of the Act.

In this connection the Court's decision in *Atlantic Refining Co.* v. *Public Service Commission of New*

York, 360 U.S. 378, is not at all in point, despite the Commission's assertion (FPC Br. 38) that it "tends" against Sun's position here. The *Atlantic* case involved the Commission's power to attach a rate condition to a certificate under Section 7(e) of the Act, and the Court commented that the imposition of a proper rate condition in a certificate proceeding is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, as construed in *Mobile* (360 U.S. at 391). We do not, of course, question in this case the Commission's power to attach appropriate rate conditions to certificates, but such a rate-conditioning power is simply not an issue here. Most assuredly, on the other hand, the Commission's rejection of Sun's 1957 contract submitted as an initial rate schedule does constitute an encroachment upon Sun's initial rate-making privileges. In that respect the *Atlantic* decision supports Sun's position here. And in Sun's main Brief, we have pointed out other ways in which the *Atlantic* decision supports Sun's position here (*e.g.*, Sun Br. 16, 26, 34-35).

Sun does not argue that the 1957 contract must represent an initial rate schedule because suspension would "interfere" with or "modify" the terms agreed upon by the parties (FPC Br. 33, 37). That is one among many of the *effects* of the Commission's position here, but it is not in itself the *cause* of Sun's position. Sun's position is that its 1957 contract should properly be treated as an initial rate schedule because it is such under Section 4(c) of the Act, as construed in *Mobile*. Nor does Sun argue that private contracts "* * * are not subject to regulation at all * * *" (FPC

Br. 35). By the same token, Sun recognizes the "* * * 'overriding authority of the Commission,' * * * *" (FPC Br. 35).[13] Such statements as those just quoted from the Commission's brief simply do not approach the issue here. Similarly, the Commission's statement (FPC Br. 37) that, "* * * If Sun were correct, no mutually agreed-upon rate * * * would constitute a changed rate within Section 4(d) * * *" is completely in error. We have already pointed out that we do not here question that price adjustments under contracts (and rate schedules) which otherwise continue in effect may be "changes" within the meaning of Section 4(d). We shall make this point again in connection with certain cases which are mentioned below.

The Commission (FPC Br. 29-31) cites certain decisions of courts of appeals for the proposition (FPC Br. 29) that "* * * rate changes contemplated by contracts filed as rate schedules are not self-executing and can become effective only after compliance with the notice provisions of Section 4(d) * * *." The statement of the proposition alone readily shows that neither the statement nor the cases are in point here. For the proposition includes changes "* * * *contemplated* by contracts filed as rate schedules * * *." In our case Sun's 1947 gas sales contract which was filed as a rate schedule did not *contemplate* any change at all within the scope of this case. It simply provided for a fixed duration, and at the end of that period of time it came to a complete end and, therefore, ceased to exist. It did not *contemplate* any further transaction with either the same purchaser or any other purchaser, nor did it *contemplate* any further or continuing sale (or serv-

[13] See, for example, Footnotes 9 and 10, *supra*.

ice) of any kind after its own term. Viewing the facts in that light, it is somewhat amazing that the Commission appears to argue that Sun's 1957 gas sales contract, a wholly unrelated and separate transaction, amounted to a change which was *contemplated* by the 1947 contract previously filed as a rate schedule. We have already pointed out that the later contract was not a "change" in the earlier contract at all. Certainly, if the standard for determining when a "change" in a contract or rate schedule occurs within the meaning of Section 4(d) is to be based on whether the first rate schedule itself "contemplated" the change, then there can be no doubt that Sun's 1957 contract was not a change in the earlier contract, judged either as a contract or as a rate schedule. For in this case the later contract was not contemplated by the earlier contract in any conceivable manner.

The cases cited by the Commission (FPC Br. 30-31) do bear out the standard that a "change" occurs within the meaning of Section 4(d) of the Act when the rate schedule which is the subject of the change either specifically provides for or specifically contemplates the change and otherwise continues in effect. All of the cases so cited involved adjustments in price occurring under the express provisions of existing rate schedules which continued to exist after the price adjustments. In other words, the changes which occurred in those cases were clearly contemplated by the very contracts which were on file as rate schedules and which were otherwise to continue in effect. Such is plainly not the case here, since in the circumstances of this case the 1947 contract which was on file as a rate schedule contemplated only its own demise, not a

change of any kind. Thus, the 1957 contract could not constitute a change.[14]

The Commission's reliance on *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, is likewise without merit (FPC Br. 31-33). The quotation from the Court's opinion which appears in the Commission's brief is misleading unless considered in context with the entire opinion. The Commission's order involved in *Penn Water* was issued after extensive hearings on the basis of which the Commission found that indefinite continuance of the service was in the public interest. The Court affirmed the Commission's order, primarily on the basis of the authority granted the Commission in Section 206 of the Federal

[14] The decision in *Michigan Wisconsin Pipe Line Company* v. *Panhandle Eastern Pipe Line Company*, 226 F. 2d 60 (CA-6), *certiorari* denied, 350 U.S. 987, is more in point than the cases cited by the Commission. That decision shows conclusively that the filing of a contract as a rate schedule does not abrogate its terms. The Court held that the provisions of a contract as to "terms and conditions" of service were not modified in a situation where the Commission had made a specific finding, after hearing, that the rates of the company to which the terms and conditions applied were unjust and unreasonable and had later accepted a new rate schedule with a new applicability provision which, if valid, would have affected the "terms and conditions" of service. The Court specifically held that the new applicability provision was without "legal effect," because the Commission had not taken the requisite statutory steps to put it into effect to supersede the corresponding provisions of the contract. The Court recognized that the Commission had the authority to modify contractual arrangements, but only by following the procedure of Section 5(a) of the Act. Relating that case to the case here, it is apparent that Sun's mere filing of its 1947 contract as a rate schedule, with no authorized action being taken by the Commission thereafter with respect to the rate schedule, would not extend the duration of the contract or rate schedule beyond its stipulated expiration date. See also *Central Kansas Power Co.* v. *Kansas State Corporation Commission*, 316 P. 2d 277 (Kan. Sup. Ct.).

Power Act, which is substantially identical with Section 5(a) of the Natural Gas Act. The Court pointed out that under that section the Commission had the power to order the companies involved to continue indefinitely their long-existing operational "practice" of integrating their power output. The Court also relied on Section 202 of the Power Act, authorizing the Commission to compel interconnection and coordination in the public interest, for which section there is no counterpart in the Natural Gas Act. In sum, the action taken by the Commission in the *Penn Water* case compared to action which might be taken by the Commission to alter a rate schedule, after full hearing and appropriate findings, under Section 5(a) of the Natural Gas Act. After the taking of such action, the regulated company could itself seek a further change in the newly imposed rate schedule only by proceeding under the rate change provisions of the appropriate statute. That explanation accounts for the language of the Court's opinion quoted in the Commission's brief. No such proceeding as in *Penn Water* occurred in this case, even assuming the propriety of a proceeding to extend the duration of a rate schedule, and, consequently, the *Penn Water* decision is not relevant here.

Finally, the insistent demand which the Commission makes in favor of a maximum of regulatory authority (*e.g.*, FPC Br. 37) finds a ready answer in the Court's statement in the *Memphis* decision, 358 U.S. at 113:

> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose

financial stability the gas-consuming public has a vital stake. * * *"

One of the legitimate interests concerned is surely the reasonable preservation of the integrity of the private contracts involved in the regulatory scheme. Such a preservation is at stake here.

CONCLUSION

For the additional reasons urged herein, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

MARTIN A. ROW
EDWIN M. CAGE
P. O. Box 2880
Dallas 21, Texas

LEO J. HOFFMAN
Turner, White, Atwood
McLane and Francis
1900 Mercantile Dallas Bldg.
Dallas 1, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 321.—October Term, 1959.

Sun Oil Company, Petitioner, v. Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents many of the same issues as *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, p. —, *ante*. Petitioner, Sun Oil Company, is an independent producer making sales of natural gas to transmission companies in interstate commerce for ultimate resale to the public. In 1947 it entered into a contract with the Southern Natural Gas Company, a transmission company, for the sale of natural gas which petitioner controlled in the Gwinville Gas Field in Jefferson Davis and Simpson Counties, Mississippi. The term of the contract was 10 years and the sales price was roughly eight cents per Mcf.

After this Court's decisions in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, on June 7, 1954, the Commission, in a series of orders, required independent producers engaging in jurisdictional sales on or after the date of the decision to apply for certificates of public convenience and necessity pursuant to § 7 (c) of the Natural Gas Act.[1] Under protest, petitioner applied for a certificate "authorizing the sale of natural gas in the circumstances . . . described" in its application. The described circumstances consisted simply of a reference to its contract with Southern Natural, which was at the same time submitted

[1] The pertinent provisions of § 7 (c) are set forth in our opinion in the *Sunray* case, p. —, n. 15, *ante*.

by petitioner as its rate schedule. In an abbreviated and consolidated proceeding disposing of over 100 separate docket certificate applications from 40-odd independent producers, scattered from Colorado and New Mexico to West Virginia, the Commission on May 28, 1956, ordered issued to petitioner and each of the other applicants a certificate of public convenience and necessity, in the terms set out in the margin.[2] Petitioner's contract-rate-schedule was accepted as its FPC Gas Rate Schedule No. 55.

The 1947 contract between petitioner and Southern Natural expired on August 26, 1957. The parties however entered into a new 20-year contract for continued

---

[2] "The Commission ORDERS:

"(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

"(B) The certificate issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicant within 30 days from issuance of this order.

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

"(D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicant. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved."

sale of gas from the same field, commencing on September 3, 1957. The contract called for an initial price increase of roughly 150 per cent, to 20 cents per Mcf.[3] Petitioner took the view that the certificate it had received in 1956 was limited in term to the duration of the old contract. It accordingly filed an application for a new certificate covering the new contract, and filed the new contract as an initial rate schedule under the new certificate, pursuant to § 5 of the Act.[4] The Commission, in a letter order of September 12, 1957, rejected the certificate application as duplicative of petitioner's existing certificate to make sales from the field in question, and rejected the rate-schedule filing on the ground that the purported initial rate schedule was actually a change in its existing Schedule No. 55. A motion for reconsideration was later denied; and at the same time the Commission ordered suspended, under § 4 (e) of the Act,[5] the effectiveness of the rates in the new contract, which petitioner had, after their rejection as an initial rate schedule, filed under protest, as rate changes pursuant to § 4 (d). 18 F. P. C. 609, 611. After an application for rehearing of the suspension order was rejected, petitioner petitioned for review of all these orders of the Commission in the Court of Appeals for the Fifth Circuit.[6] That court affirmed, by a divided vote. 266 F. 2d 222. We granted certiorari. 361 U. S. 880.

[3] There are slight discrepancies in comparison between the old and new rates, due to the fact that they are computed on somewhat different pressure bases. The Commission states that giving effect to the difference would somewhat increase the spread between the old and the new rates.

[4] For the pertinent provisions, see the *Sunray* opinion, p. —, n. 11, *ante*.

[5] For the provisions, see the *Sunray* opinion, p. —, n. 13, *ante*.

[6] The Commission takes the position that an order suspending a rate change under § 4 (e) is not directly reviewable in the Court of Appeals. But since the very same issues are presented in this case by the Commission's rejection of the application for a new certificate,

Petitioner's contention here, as it was below, is that the initial certificate it obtained in 1956 was to remain in effect only during the life of the 1947 contract. This in its view would leave it free to discontinue interstate sales after the 1957 expiration of the contract, or to apply for a new certificate for new sales, and, not unimportantly, file the new sales contract as an initial rate schedule thereunder rather than as a rate change. We reject this contention and affirm the judgment of the Court of Appeals.

First. The major part of petitioner's argument is based on a want of authority in the Commission, over objection, to grant an independent producer a certificate for a longer duration than the term of a sales contract which its application seeks permission to fulfill. To be sure, if the Commission had no such authority, we might take pains to read the petitioner's application as seeking a certificate so limited in time, though, as compared with Sunray's in the companion case, it is highly inexplicit as to its desire that only a term certificate be issued. But we have held today in the *Sunray* case, p. —, *ante*, that in these circumstances the Commission has authority to tender a permanent certificate under an application for a term certificate; and accordingly this keystone of petitioner's argument falls.

Second. Of course, if, despite its authority to grant a permanent certificate, the Commission had in 1956 actually granted a term certificate to petitioner, petitioner

---

and its rejection of the filing of the 1957 contract rate as an initial rate under § 4 (e), which orders are concededly reviewable in the Court of Appeals, all the contested issues raised before the Commission were properly subject to review in the proceedings below and here, as the Commission concedes. If the Commission was in error in rejecting the application for a new certificate and the purported initial rate filing, the § 4 (e) rate change filing, which the petitioner made under protest, doubtless would be withdrawn.

would after the term have been free to apply for a new certificate to authorize the sale under the new contract. But we agree with the Commission that the 1956 certificate was a permanent one. The application itself, under the construction we have given the statute in *Sunray*, did not with any explicitness ask for a limited certificate. It asked for one "authorizing the sale of natural gas" under the 1947 contract; but as we said in *Sunray*, a permanent certificate would do that. See p. —, *ante*. And the certificate issued makes no reference to any limitation of time. This is in contrast with explicit references to the limitation in those instances where the Commission had previously issued term certificates.[7] The Commission's order, which blanketed the many applications before it in the mass proceeding, is no more explicit about limitation than the application, and refers, in fact, to the certificate as both "authorizing the sale" of natural gas, and authorizing a "service," which accords with our construction of § 7 (e) in *Sunray*. Under these circumstances we would hardly see any basis for overturning the Commission's view that no limitation as to time was implied. Cf. *Andrew G. Nelson, Inc.*, v. *United States*, 355 U. S. 554, 560.

Moreover, if there were any doubt as to the matter, it would be removed by the fact that the batch of certificates containing petitioner's was issued at a time when the Commission was asserting that it lacked even the power to issue a term certificate. The certificate in question was issued May 28, 1956. The Commission had taken the position that it lacked such authority on July 25, 1955, in *Sunray Oil Corp.*, 14 F. P. C. 877. It was not until October 29, 1956, that judicial rejection of

[7] See, e. g., *Louisiana-Nevada Transit Co.*, 2 F. P. C. 546, 549 (10 years); *Ray Phebus*, 2 F. P. C. 1044, 1045 (8 years); *Southern Natural Gas Co.*, 8 F. P. C. 688, 689 (1 year).

the Commission's position occurred.[5] *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, reversed on other grounds, 353 U. S. 944. Nothing in petitioner's application shows an attempt to take issue with that conception of the Commission, which of course would mean that every certificate granted under its influence would be intended to be permanent. It would surpass belief to say that under these circumstances the Commission tendered and the applicants received these certificates under the assumption that they were limited in time to the terms of the contracts on which the applications were based.

Affirmed.

---

[5] While the Court of Appeals there affirmed the Commission's order on other grounds from those on which it had proceeded—for which action the Court of Appeals' judgment was reversed here—the Commission had, before the Court of Appeals, maintained its position that it was without authority to grant a limited term certificate. 239 F. 2d, at 100, n. 7. It abandoned that position when application for certiorari was made here. 353 U. S. 944.

SUPREME COURT OF THE UNITED STATES

Nos. 321 AND 335.—OCTOBER TERM, 1959.

Sun Oil Company, Petitioner, 321 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Sunray Mid-Continent Oil Co., Petitioner, 335 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART join, dissenting.

The basic issue presented by these two cases is essentially this: When an independent producer of natural gas enters into a contract for the sale of his gas in interstate commerce for resale, and seeks a certificate from the Federal Power Commission to carry out that contract, may the Commission issue a certificate of unlimited duration not limited to the term of the contract, in the absence of a special showing that the public convenience and necessity require the certificate to be perpetual? In holding that it may, I believe the Court has strained the provisions of the Natural Gas Act beyond permissible limits in order to reach a result which it deems more appropriate to effective regulation. In my opinion, neither will the Act bear the meaning the Court attributes to it, nor will a contrary interpretation bring about the practical evils which the Court imagines.

I.

In my view the Court's conclusions are attributable at bottom to its failure to take into account the basic distinction between an interstate pipeline and an inde-

pendent producer of natural gas. A pipeline performs a service akin to those traditionally performed by public utilities. The independent producer, on the other hand, is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. The Court's basic error, it seems to me, is its notion that the petitioners are rendering a continuing service to the public in the same sense as a pipeline or other conventional utility, to which the usual modes of utility regulation are equally applicable.

I think that the Natural Gas Act, particularly as construed by the Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, recognizes this important distinction. The basic jurisdictional framework of the Natural Gas Act is found in § 1 (b) which provides:

> "The provisions of this chapter shall apply to the *transportation* of natural gas in interstate commerce, to the *sale* in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation *or* sale, but shall not apply to . . . the production or gathering of natural gas." (Emphasis added.)

In *Phillips* the application of this provision to independent producers, such as the petitioners in these cases, was considered. Phillips there contended that it was not subject to the Act because it did not engage in the interstate transmission of gas and was not affiliated with any interstate pipeline company, and that to regulate its prices would be to control the "production or gathering" of natural gas, which is specifically exempted by § 1 (b). The Court rejected that argument, holding that Phillips' *sales*, which were unquestionably made "in interstate commerce . . . for resale," were subject to the Commission's jurisdiction.

It recognized that the Act creates two separate and distinct bases of jurisdiction—transportation, and sale; that an independent producer engages solely in the latter; and that because of the production and gathering exemption, it is *only* the act of sale itself, which occurs at the very end of the production and gathering process, to which the Commission's jurisdiction attaches. It is thus evident that the Court recognized that, as to independent producers, the Act envisaged only a limited scheme of regulation, namely control over the prices and the other terms of sale of their natural gas. The blurring of this distinction respecting the scope of the regulatory scheme of the Act as between independent producers and others can only lead to confusion when, as here, the Court is faced with deciding the proper scope of the operative provisions of the statute.

The operative provisions of the Act consistently reflect their more limited reach as regards independent producers than with respect to others. Section 7 (c) requires certification in order to

> "engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof . . . ."

Thus three distinct categories of jurisdictional acts are subject to certification: (1) transportation, (2) sale, and (3) maintenance of jurisdictional facilities. A pipeline must necessarily secure authorization for both transportation and maintenance of jurisdictional facilities, acts which by their nature are continuing services. But I do not understand the Court to contend that petitioners, as independent producers, have engaged in any jurisdictional act other than a sale.

The word "sale," in its ordinary sense, signifies a transaction limited in duration and amount. Section 7 (c) requires certification of a sale, and there is nothing in the Act which suggests that the certification is to be broader than the jurisdictional act which it authorizes. On the contrary, § 7 (e), *ante*, p. —, directs the Commission to issue a certificate authorizing "the . . . sale . . . covered by the application." The Court suggests that a perpetual certificate does in fact authorize the specific sale proposed, and that to say that the Commission can authorize *no more* than that is to "load" the statutory language with a negative implication which was never intended. However, authorizing a producer to sell in perpetuity is certainly something different from authorizing him to make a specific sale. It could hardly be contended that a statutory direction to the Commission to authorize "the . . . sale . . . covered by the application" permits it to authorize some *different* sale.

The Court's assumption that a perpetual certificate authorizes nothing different than what the producer has in effect applied for can in the end be justified only by its view, alluded to before, that what is involved is not a "sale" at all, but a "service" consisting of the perpetual movement of gas in interstate commerce. However, as already mentioned, this flouts the industrial realities. The independent producer does not perform a service; he owns and sells a commodity. Since he need not dedicate his gas supply to the interstate market at all, surely he may propose the amount he will dedicate. The Commission of course need not accept the proposal. But neither can it in effect require acceptance of a certificate authorizing something more, on pain of denying the applicant any certificate, without satisfying the requirements of § 7 (e), *infra*, for the imposition of conditions on certificates.

The Court, however, purports to find support in the statute for its notion that a sale is really a perpetual

service. It relies primarily on § 7 (e), which provides in relevant part that

> "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the *operation, sale, service, construction, extension, or acquisition* covered by the application, if it is found that the applicant is able and willing properly to *do the acts and to perform the service* proposed, . . . and that the proposed *service, sale, operation, construction, extension, or acquisition* . . . will be required by the . . . public convenience and necessity . . . ." (Emphasis added.)

It would appear plain from the face of the very language quoted that, while the word "service" is used, it is used disjunctively with "sale" and several other words, so that a sale and a service are simply two different, and not synonymous, things the Commission is authorized to certificate. However, the Court reasons that "service" must refer back to "transportation or sale," for which § 7 (c) requires a certificate. But § 7 (c) requires a certificate for three separate categories of jurisdictional acts—transportation, sale, and maintenance of facilities. And § 7 (e), concededly referring back to those categories, lists six items—operation, *sale*, service, construction, extension, and acquisition. Why the term "service" in § 7 (e) should be thought to refer to "sale," the least apt of the three categories in § 7 (c) which it could describe, when it is immediately preceded in § 7 (e) by the word "sale" itself, is difficult to understand.

The Court further says that the provisions of §§ 4 (c)[1] and 7 (b)[2] present the same feature. In § 4 (c), the word

[1] "(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and

[*Footnote 2 is on p. 6.*]

"service" again appears as part of an omnibus definition which refers to a number of antecedents. Even assuming, as the Court does, that the only antecedent is "transportation or sale," there is no reason to suppose that "service" was meant to be taken as the equivalent of "sale" as well as of "transportation," or that it limits either. Section 7 (b) refers only to the abandonment of services "rendered by means of" jurisdictional facilities. There is not the slightest hint in the section that sales are considered to be such services.[2]

Finally, the Court points to the requirement of § 7 (e), *ante*, p. —, that the applicant for a certificate be willing and able "to do the acts and perform the service proposed." From this it infers that *all* the matters for which § 7 (c), *ante*, p. —, requires a certificate "must be justified in terms of a 'service' to which they relate." I should have thought it quite plain that an applicant is required to "perform the service proposed" only *if* a service is proposed. Perhaps it would have been more apt for Congress to have said "do the acts *and/or* perform the services proposed," but I cannot understand how the

---

in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

[2] "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

clause as written can be read as meaning that whatever the applicant proposes must be both an act and a service.

I must conclude that there is nothing in the statute which makes "sale" the equivalent of "service." On the contrary, the terms are always used disjunctively. A sale, as a jurisdictional ground distinct from either transportation or the maintenance of jurisdictional facilities (§ 1 (b) *ante*, p. ——) is a limited transaction. A certificate authorizing a sale authorizes no more and, in my view, must be regarded as expiring when the underlying sale terminates, except in a situation where the Commission has properly conditioned issuance on continuance of the certificate for a longer period. See *post*, p. ——. It is suggested that the Commission has consistently held that the obligation to provide service persists even after a particular contract terminates. See *United Gas Pipe Line Co.*, 3 F. P. C. 3; *Cabot Gas Corp., id.*, 357; *Godfrey L. Cabot, Inc., id.*, 582; *Panhandle Eastern Pipe Line Co.*, 11 F. P. C. 167, 172. All those cases, however, involved pipeline companies which were in fact providing a continuing service and which had facilities subject to the jurisdiction of the Commission regardless of the duration of a particular contract. They serve as no authority for the present quite different situation where an independent producer is subject to the Commission's jurisdiction only by virtue of his sales.

II.

The Court asserts that a construction of the statute contrary to the one it reaches will result in intolerable consequences, primarily in two respects. *First*, it says, producers and pipelines would be able to abandon their undertakings at the end of the contract term without a showing that the public convenience and necessity justify such abandonment, thus defeating the policy of § 7 (b) of

the Act, and giving the industry a lever to avert regulation of any kind. *Second*, it concludes, producers would be able, at the expiration of their contracts, to file a higher price as an initial rate under a new certificate. This would force the Commission, it is said, to test the reasonableness of the rate under § 5 (a), *ante*, p. —, where the Commission has the burden of proof and where experience has shown the procedure to be subject to great delays, and would avoid the rate-change procedures of § 4 (e), *ante*, p. —, where the producer has the burden of proof and the effectiveness of the rate can be suspended pending investigation.

As to abandonment, the Court's view again rests on the erroneous notion that the Commission is charged with assuring continuity of "service" on the part of independent producers. However, § 7 (b), by its own terms, prohibits abandonment of only two things: jurisdictional facilities, and any service "rendered by means of" such facilities. The Court does not suggest that petitioners have any jurisdictional facilities. And there can be no apprehension about the pipelines, since they clearly provide a service by means of jurisdictional facilities and are certificated for an unlimited duration.

There is a more basic reason, however, why the evils which the Court imagines do not exist. The Commission is required to issue a certificate only if the applicant's proposal is required by the public convenience and necessity. The vast majority of sales are, of economic necessity, bona fide transactions of substantial duration (see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, at 344) and will, of course, be approved in ordinary course. But surely, if a proposal contains such disingenuous provisions as the Court suggests, its certification would not be in the public interest. The Court's fear that denial of the certificate under such circumstances would be

overturned on review is the sheerest speculation, especially in an area where the Commission is entrusted with such wide discretion.

Furthermore, the Commission can tender a perpetual certificate under its § 7 (e) power to attach reasonable terms and conditions.[3] But in such a case, it would have to bear the burden of showing that the public convenience and necessity require such a condition. What the Court in effect permits the Commission to do here is simply to attach the condition without such a showing. If, as the Commission stoutly maintains, a limited certificate would constitute a serious threat to the public interest, then surely it is not too much to ask it to show that fact before tendering a producer a certificate different from the one he has requested. And where the Commission has fairly made such a showing, I cannot believe, with all deference to the Court's contrary intimation, that there is the slightest danger that its action would nonetheless be overturned on the theory it was attempting to accomplish indirectly that which it cannot do directly. Such a view assumes that a court will be blind to the conditioning power expressly given the Commission by statute, and ignores the fact that there is a very real difference between tendering an unlimited certificate when the Commission has made no affirmative showing of public need for a perpetual duration and tendering one when it has made such a showing. In the last analysis, that additional burden is the only consequence which turns on the outcome of these cases.

I would hold that where, as in No. 335, an independent producer applies for authority simply to engage in a sale transaction specifically limited in duration, the Commis-

[3] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

sion has no authority to tender an unlimited certificate without bearing the burden of showing that such a departure from the proposal is required by the public convenience and necessity.

III.

The question remains whether petitioner in No. 321 proposed a sale transaction which was limited in duration, and whether the Commission certificated no more than that sale. The term of the contract filed with the Commission was clearly limited to 10 years. Petitioner's application incorporated that contract by reference, and declared that "[t]his application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described." The Commission ordered that a certificate be "hereby issued . . . authorizing the sale by Applicant of natural gas . . . as more fully described in the application and exhibits in this proceeding. . . . The certificate . . . shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act . . . ." I think the fair interpretation of all this is that what was authorized was the sale proposed, and that the certificate should therefore be taken as limited in duration to the term of the sale contract.

The Commission, however, contends that since, at the time petitioner's certificate was issued, it had taken the position in *Sunray Oil Corp.*, 14 F. P. C. 877, that it had no power to issue a certificate specifically limited in duration, this certificate must be taken as one unlimited in duration. That position, however, was later reversed on appeal, *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, and the Commission acquiesced therein. But the Commission was more fundamentally wrong in believing that a certificate authorizing a sale

is unlimited unless specifically otherwise conditioned. Therefore, when it tendered to petitioner a certificate without any limiting language, its erroneous belief that it was issuing a perpetual certificate could not bind petitioner. The Commission was authorized to issue only a certificate limited to the duration of the sale unless a condition were expressly imposed to the contrary, and what it issued purported to be no more than that. Petitioner cannot be taken to have acquiesced in a certificate authorizing something other than it requested, where the certificate gave no notice of that fact, simply because the Commission may have believed its effect to be otherwise.

I fear this is another instance where the Court has taken impermissible liberties with statutory language in order to remedy what it considers an undesirable deficiency in the way Congress has written the statute. Cf. *United States* v. *Republic Steel Corp.*, 363 U. S. —, — (dissenting opinion).

I would reverse the judgments in both cases.

SUPREME COURT OF THE UNITED STATES

Nos. 321 and 335.—October Term, 1959.

Sun Oil Company, Petitioner, 321 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Sunray Mid-Continent Oil Co., Petitioner, 335 *v.* Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

Mr. Justice Frankfurter, concurring in the dissent.

In joining Mr. Justice Harlan's opinion I should like to add a word by way of emphasis.

Once analysis of the problem of these two cases, relating as they do exclusively to independent producers of natural gas, is stripped of darkening details and reduced to its statutory determinants, as spelled out in my Brother Harlan's dissent, the answer becomes clear and uncomplicated. If a licensing agency has power to grant a particular kind of license, an applicant has the right to apply for such a license. It may be withheld without ado only if the agency has arbitrary—judicially unreviewable—power to withhold such a license. Concededly the Commission has power to grant a time-limited certificate, and its denial of such a certificate is not free from judicial review. Therefore it must give a reason for denying a proper application, with due regard, of course, to its wide discretionary power for determining what satisfies "public convenience and necessity." The Commission cannot rest denial on its *ipse dixit*. Nor can the Commission rest on the general spirit or the ultimate purposes of the Natural Gas Act, for to do so amounts to saying that the Act forbids time certificates, when in fact it does not.